SUPREME COURT, U. S.

FEB 14 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73- 1254

UNITED STATES STEEL CORPORATION,
BETHLEHEM STEEL CORPORATION,
REPUBLIC STEEL CORPORATION,
JONES & LAUGHLIN STEEL CORPORATION,
YOUNGSTOWN SHEET AND TUBE COMPANY,
ARMCO STEEL CORPORATION,
INLAND STEEL CORPORATION and
NATIONAL STEEL CORPORATION,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and
UNITED MINE WORKERS OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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OCTOBER TERM, 1973

No. 73-

UNITED STATES STEEL CORPORATION,
BETHLEHEM STEEL CORPORATION,
REPUBLIC STEEL CORPORATION,
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ARMCO STEEL CORPORATION,
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NATIONAL STEEL CORPORATION,
Petitioners.

v.

NATIONAL LABOR RELATIONS BOARD and
UNITED MINE WORKERS OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioning steel companies pray for a writ of certiorari to review a November 19, 1973 judgment-order of the United States Court of Appeals for the District of Columbia Circuit.

Jurisdiction.

OPINIONS BELOW

The *per curiam* judgment-order of the court of appeals (App. A, *infra*) is unreported. An earlier decision of the court of appeals in this case (App. B, *infra*) is reported at 468 F.2d 1139. The opinion of the National Labor Relations Board (App. C, *infra*) is reported at 188 NLRB 738.

JURISDICTION

The judgment-order of the court of appeals was entered on November 19, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Section 10(f) of the National Labor Relations Act states that "person[s] aggrieved by a final order of the Board" are entitled to court "review of such order." The National Labor Relations Board held the so-called Eighty Cent Clause not unlawful. Petitioners, who were intervenors when this case was last before the court of appeals, are parties to this clause's present form, which, in all essentials, is identical to the original clause. Denial of standing will require Petitioners to pay the clause's penalties without court review of its legality, will prevent resolution of the Sixth Circuit-Board conflict concerning its legality, and may preclude court review concerning the legality of clauses based upon it. Under these circumstances, the question presented is:

1. Are petitioning steel companies "person[s] aggrieved by a final order of the Board" entitled to "review of such order" under Section 10(f) of the National Labor Relations Act?

STATUTE INVOLVED

Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. §160(f) (1970):

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (3) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF THE CASE

On or about March 23, 1964, the International Union, United Mine Workers of America ("UMW") and the Bituminous Coal Operators Association ("BCOA") agreed to include the following clause in the National Bituminous Coal Wage Agreement ("Agreement") effective April 2, 1964:

> During the life of this agreement there shall be paid into [the union welfare fund] by each Operator signatory hereto the sum of forty cents (40 cents) per ton of two thousand (2000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80 cents) per ton of two thousand (2000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40 cents) per ton had not been paid into said Fund prior to such procurement or acquisition.

The clause is popularly referred to as the "Eighty Cent Clause" because its original version provided that a signatory to the Agreement purchasing or otherwise acquiring any type of coal from a nonsignatory shall pay a "royalty" of eighty cents for each ton of coal so acquired into the UMW Welfare and Retirement Fund ("UMW Fund").

Statement of the Case.

In contrast to the eighty cent per ton "royalty" for nonsignatory coal, the original Eighty Cent Clause required payment of only forty cents per ton into the UMW Fund for coal either produced by a signatory itself, or acquired by one signatory from another. In the latter case, only one forty cent per ton payment was required.

In April 1964, Dixie Mining Company ("Dixie") and Dan S. Davison, an individual acting for and on behalf of Riverton Coal Company ("Riverton"), each filed unfair labor practice charges with the NLRB against the UMW, various UMW-affiliated districts, locals and officers, and the BCOA. The fundamental[1] basis of these charges is that the financial penalties imposed by the Eighty Cent Clause restrain signatories from procuring coal from nonsignatory sources, or, in other words, the Eighty Cent Clause is a union signatory clause in violation of section 8(e) of the National Labor Relations Act ("Act"), 29 U.S.C. §§151, 158(e)(1970). Neither Dixie nor Riverton were parties to the Eighty Cent Clause.[2]

Dixie's and Riverton's unfair labor practice charges, together with charges filed by two other parties who did not participate actively in the case after filing, were consolidated for hearing in the Fifth Region

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1. The other unfair labor practice charges which were filed stem from and consequently hinge upon a finding of illegality under the National Labor Relations Act's section 8(e).

2. Dixie never became a party, but, because of illegal pressure, Riverton later did. See note 3, *infra*.

of the National Labor Relations Board ("Board" or "NLRB").

Petitioners herein ("Steel Companies"), which are corporations principally engaged in the production and sale of steel throughout the United States, became *amici curiae* in the Eighty Cent Clause proceedings before the Board.

These Steel Companies own and operate coal mines for producing coke necessary for the manufacture of steel, but, on occasion, require more coal, or coal of a different kind, than their mines are capable of producing.

Like Dixie and Riverton, the Steel Companies were not subject originally to the Eighty Cent Clause. In 1968, however, the Steel Companies executed a side agreement providing, *inter alia*, that

> [i]f during the life of the [A]greement all questions concerning the lawfulness of the 80-cent clause shall have been resolved in favor of such clause by the court of last resort, the below named employer to whom such clause shall not have been applicable, shall engage in good faith negotiations . . . concerning what action may be appropriate between it and the UMWA under the then existing circumstances.

Finally, in 1971, the UMW refused to agree to another side agreement, and insisted that the Steel Companies become fully subject to the current, but essentially unchanged, Eighty Cent Clause. The Steel Companies did so.

Riverton, one of the two active charging parties, had dropped out of the NLRB proceedings in the meantime, to pursue a federal court damage action against the UMW.[3]

On February 26, 1971, despite having found the Eighty Cent Clause unlawful on two previous occasions,[4] the Board, in a three-two decision, refused to adopt its trial examiner's decision, ruled that the Eighty Cent Clause was not unlawful under section 8(e) and dismissed the applicable unfair labor practice charges. *International Union, UMW,* 188 NLRB 753 (1971) (App. C, *infra*).

On March 10, 1971, the D. C. Circuit, on its own motion, asserted jurisdiction of the NLRB proceedings concerning the Eighty Cent Clause.

While the proceedings[5] before the D. C. Circuit were pending, the present form of the Eighty Cent Clause, to which the Steel Companies are subject, became effective on November 12, 1971:

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3. Ultimately, Riverton prevailed on its damage claim, after the United States Court of Appeals for the Sixth Circuit had held the Eighty Cent Clause unlawful under 8(e). *Riverton Coal Co. v. UMW,* 453 F.2d 1035 (6th Cir. 1972), *cert. denied,* 407 U.S. 915 (1972).

4. *Raymond O. Lewis,* 148 NLRB 249, 52-4 (1964), *remanded on mootness grounds, sub nom. Lewis v. NLRB,* 350 F.2d 801, 802, n.2 (D.C. Cir. 1965) (legality of Eighty Cent Clause decided by NLRB on petition of UMW), and *International Union, UMW,* 165 NLRB 467 (1967), *remanded sub nom. International Union, UMW v. NLRB,* 399 F.2d 977 (D.C. Cir. 1968).

5. The Steel Companies were intervenors before the D.C. Circuit in this action.

During the life of this agreement, each operator signatory hereto shall pay into [the union welfare fund] on each ton of two thousand (2,000) pounds of bituminous coal produced by such operator for use or for sale an amount as follows: For the period beginning November 12, 1971 and ending November 11, 1972, 60 cents per ton on each ton produced during the period; for the period beginning November 12, 1972 and ending May 11, 1973, 65 cents per ton on each ton produced during the period; for the period beginning May 12, 1973 and ending November 11, 1973, 70 cents per ton on each ton produced during the period; for the period beginning November 12, 1973 and ending May 11, 1974, 75 cents per ton on each ton produced during the period; and for the period beginning May 12, 1974 and ending when this agreement is terminated, as provided for by its terms, 80 cents per ton on each ton produced during the period. On all bituminous coal procured or acquired by any signatory operator for use or for sale (i.e., all bituminous coal other than that produced by such signatory operator), there shall, during the life of this agreement, be paid into such Fund by each such signatory operator hereto or any subsidiary or affiliate of such operator signatory hereto an amount per ton which is equal to the amount which would be payable hereunder if the signatory operator had produced the coal for use or sale plus forty cents (40¢) per ton on each ton of such bituminous coal so procured or acquired on which the amount per ton payable hereunder

> on coal produced for use or sale had not been paid into said Fund prior to such procurement or acquisition.

Only immaterial variations exist between the Eighty Cent Clause's original and current forms; all the clause's essentials remain unchanged. Excluding escalation in royalties, for instance, the clause's original language is identical. Equally unchanged is the Eighty Cent Clause's forty cent per ton "royalty" differential between nonsignatory and signatory coal. In fact, the only change from the original Eighty Cent Clause was an escalation of the royalties for nonsignatory and signatory coal.

The D. C. Circuit, on October 2, 1972, decided that it incorrectly had asserted jurisdiction, and dismissed because no aggrieved person within the meaning of 10(f) of the Act had petitioned for review of the February 26, 1971 decision. *International Union, UMW v. NLRB,* 468 F.2d 1139 (D.C. Cir. 1972) (App. B, *infra*).

When Dixie, the sole remaining charging party, chose not to petition for review of the Board's February 26, 1971 decision, the Steel Companies petitioned the D. C. Circuit for review of the decision on or about June 20, 1973.

The NLRB and the UMW, as intervening respondent, thereafter moved to dismiss the petition. Their position was that the Board's February 26, 1971 decision decided the legality of nothing more than the original Eighty Cent Clause, and, since the Steel Companies were not subject to that clause, they were not

persons aggrieved by the Board order within the meaning of 10(f) of the Act.

On November 19, 1973, the D. C. Circuit entered a *per curiam* order granting the NLRB's motion and dismissing the Steel Companies' petition (App. A, *infra*).

The Steel Companies seek a review of this decision by praying for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

A. Denial Of Standing To The Steel Companies Violates Federal Labor Law And Is In Direct Conflict With Decisions Of This Court.

Section 10(f) of the Act, in relevant part, provides:

> [a]ny person aggrieved by a final order of the Board . . . denying in whole or part the relief sought may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia . . . .

On February 26, 1971, the Board held the Eighty Cent Clause a valid union standards clause, and therefore not unlawful under 8(e) of the Act, for three reasons: (1) the parties' intent in adopting the clause was to equalize the difference in wages and fringes *generally* existing between signatories and nonsignatories; (2) nonsignatory wages and fringes *generally* are lower than those of signatories; and (3) the eighty cent payment extracted from signatories for nonsignatory coal bore a *reasonable* relationship to the differential. *Supra* at 188 NLRB 753-4 (App. C at 14a-15a).

Based on these generalized findings, the Board's order concerning the Eighty Cent Clause can be — and probably will be — read to apply, either in its entirety or as controlling precedent, to the clause's current version, with its immaterial differences.

If the current Eighty Cent Clause is valid — either because its validity was determined on February 26, 1971, or because that decision is used as precedent to reach the same conclusion — the Steel Companies are required by its terms to pay repeated, economically

prohibitive penalties on all coal purchased or otherwise acquired from nonsignatories. These penalties also have the obvious effect of restraining the Steel Companies from dealing with nonsignatories with whom they have dealt in the past.

Under these circumstances, the Steel Companies are "person[s] aggrieved" by the Board's February 26, 1971 decision, have standing to petition to review that decision under 10(f) of the Act, and the D. C. Circuit violated federal labor law by dismissing their petition. The D. C. Circuit's failure to recognize the Steel Companies as aggrieved persons also directly conflicts with this Court's policy and rationale in such cases as *Association of Data Processing Service Organizations v. Camp.*, 397 U.S. 150, 154 (1970):

> Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved "persons" is symptomatic of that trend.

and *International Union, UAW v. Scofield*, 382 U.S. 205, 219 (1965):

> [The aggrieved person review standard of section 10(f)] serves the "public interest" by guaranteeing that the Board interpretation of the relevant provisions accords with the intent of Congress. [Footnote omitted.]

See also *Retail Clerks Local 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965):

> [S]tanding to appeal an administrative order as a "person aggrieved" [under 10(f)] arises if

there is an adverse effect in fact, and does not . . . require an injury cognizable at law or equity. [Citations omitted.]

B. Denial Of Standing To The Steel Companies Precludes Resolution Of The Direct Conflict Between The Sixth Circuit And NLRB On The Eighty Cent Clause's Legality.

Denial of the Steel Companies' standing to petition for review of the Board's February 26, 1971 decision upholding the Eighty Cent Clause's legality permits that decision to stand. without the benefit of court review, in direct conflict with the decision by the United States Court of Appeals for the Sixth Circuit in *Riverton Coal Co. v. UMW*, 453 F.2d 1035 (6th Cir. 1972), *cert. denied*, 407 U.S. 915 (1972). That case held that the Eighty Cent Clause is an unlawful, invalid union signatory device violative of section 8(e) of the Act:

> [T]he District Court specifically found that "an object" of the 1964 strike was to force Riverton to sign the agreement containing the eighty cent penalty clause. Another object was to compel Riverton and Davison to cease doing business with, and to cease using the products of, other coal producers who were nonsignatories. The foreseeable purpose of the eighty cent clause was "the unionization of some non-union employers."
>
> It is clear that Section 8(b)(4) of the Act forbids strike action if "an object" is to force an employer to do any of the things prohibited by Section 8(e). The statute does not mention primary object

> or purpose. If any object of the strike is forbidden by Section 8(b)(4), it is a secondary boycott. It is not necessary to find that it was the sole object. N.L.R.B. v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951).
>
> . . . .
>
> In our view, the Board decisions holding the two clauses to be illegal, appear to be better reasoned decisions. Seven Board members have held the eighty-cent clause invalid. Only three Board members and no trial examiner have held otherwise. *Supra* at 453 F.2d 1040, 1041.

As explained above, the only other person with standing to seek review of the Board's decision is Dixie, but that charging party is financially unable or otherwise unwilling to petition if the Steel Companies' standing to do so is denied.

C. Denial Of Standing To The Steel Companies May Preclude Court Review Of The Legality Of The Eighty Cent Clause As Presently Structured And Future Eighty Cent Clauses.

Denying standing to the Steel Companies could preclude court review—by anyone—concerning the legality of both the Eighty Cent Clause's current and future versions which are based upon and functionally indistinguishable from the 1964 clause.

If standing to petition the Board's February 26, 1971 decision is denied, the Steel Companies will be forced to begin again and file new unfair labor practice

charges under the Act, alleging the illegality of the Eighty Cent Clause's present form.[6]

But it is conceivable—and perhaps probable—that the NLRB's General Counsel, relying upon the Board's erroneous, but controlling February 26, 1971 decision, will refuse to issue a complaint based on unfair labor practice charges concerning current and future forms of the Eighty Cent Clause. Such a refusal by the General Counsel would be subject to no review whatsoever. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), *citing with approval United Electrical Contractors Ass'n v. Ordman*, 238 F.Supp. 738 (S.D.N.Y. 1965), *aff'd per curiam*, 366 F.2d 776 (2d Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967). *See also Contractors Ass'n of Phil. v. NLRB*, 295 F.2d 526 (3d Cir. 1961); *Street Employees Division 587 v. Ordman*, 320 F.2d 729 (D.C. Cir. 1963); *Retail Clerks Local 954 v. Rothman*, 298 F.2d 330 (D.C. Cir. 1962); and *Jacobsen v. NLRB*, 120 F.2d 96, 99-100 (3d Cir. 1941).

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6. The logical effect of the D. C. Circuit decision for which a writ of certiorari and review are sought is to require potentially endless litigation over the legality of clauses every time they are changed in some insubstantial manner.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

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v.

NATIONAL LABOR RELATIONS BOARD and UNITED MINE WORKERS OF AMERICA,

Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appendix A—Judgment-Order of the Court of Appeals, No. 73-1700 (Nov. 19, 1973) (unreported).

Appendix B—Opinion of the Court of Appeals, 468 F.2d 1139 (D.C. Cir. Oct. 2, 1972).

Appendix C—Order of the National Labor Relations Board, 188 NLRB 753 (Feb. 26, 1971).

APPENDIX A

November 19, 1973 Judgment-Order of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1700

September Term, 1973

UNITED STATES STEEL CORPORATION, BETHLEHEM STEEL CORPORATION, REPUBLIC STEEL CORPORATION, JONES & LAUGHLIN STEEL CORPORATION, YOUNGSTOWN SHEET AND TUBE COMPANY, ARMCO STEEL CORPORATION, INLAND STEEL CORPORATION and NATIONAL STEEL CORPORATION,

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

UNITED MINE WORKERS OF AMERICA,

Intervenor

BEFORE: BASTIAN, *Senior Circuit Judge* and TAMM, *Circuit Judge*.

Order

On consideration of respondent's motion to dismiss petition for review and of the response in opposition thereto, it is

ORDERED by the Court that the aforesaid motion is granted and the petition for review herein is dismissed, and it is

FURTHER ORDERED by the Court that the motion to dismiss of intervenor, the United Mine Workers, is dismissed as moot.

Per Curiam

APPENDIX B

October 2, 1972 Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,129

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ITS DISTRICTS 17 AND 28, AND ITS LOCALS 6594 AND 6937, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
DIXIE MINING COMPANY, DAN S. DAVISON, UNITED STATES STEEL CORPORATION, ET AL., INTERVENORS

No. 21,226

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BITUMINOUS COAL OPERATORS ASSOCIATION, RESPONDENT
INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, DISTRICTS 17 & 28, AND LOCALS 6594 & 6937, UNITED STATES STEEL CORPORATION, ET AL., INTERVENORS

No. 23,947

DIXIE MINING COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
W. A. BOYLE, GEORGE J. TITLER AND JOHN OWENS, AS AGENTS FOR INTERNATIONAL UNION, UMW, AND AS MEMBERS OF JOINT INDUSTRY CONTRACT COMMITTEE, INTERVENORS

Petitions to Review an Order of the National Labor Relations Board

Decided October 2, 1972

Opinion of the Court of Appeals.

Before BAZELON, *Chief Judge* and WRIGHT and TAMM, *Circuit Judges.*

PER CURIAM: These consolidated appeals in this continuing litigation[1] challenge certain provisions of the National Bituminous Coal Agreement as violative of Section 8(e) of the National Labor Relations Act.[2] For the reasons stated below, we dismiss all appeals for lack of a justiciable case or controversy and want of jurisdiction.

I. *No. 23,947*

In 1958 the United Mine Workers and the Bituminous Coal Operators Association amended the National Bituminous Coal Wage Agreement by inserting a so-called "Protective Wage Clause" (PWC). The clause provides, in relevant part: "* * * [T]he Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by

---

1. *See Int. Union, United Mine Workers v. NLRB*, 130 U.S. App.D.C. 244, 399 F.2d 977 (1968).

2. Section 8(e), 29 U.S.C. § 158(e) (1970), provides, in relevant part:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void[.] * * *"

them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract."

Independent coal producers challenged this clause before the Labor Board, and in 1963 the Board held that it was a "union standards clause" in violation of Section 8(e). *See Raymond O. Lewis, W. A. Boyle and John Owens,* 144 NLRB 228 (1963). When review was sought in this court, we pointed out that the Board's decision preceded several of our decisions permitting union standards clauses so long as they were "germane to the economic integrity of the principal work unit.'" *See, e.g., Orange Belt District Council of Painters No. 48 v. NLRB,* 117 U.S.App.D.C. 233, 237, 328 F.2d 534, 538 (1964); *Truck Drivers Union Local No. 413 v. NLRB,* 118 U.S.App.D.C. 149, 334 F.2d 539 (1964). *Cf. National Woodwork Manufacturers Assn. v. NLRB,* 386 U.S. 612 (1967). We therefore remanded the case to the Board for further consideration. *Lewis v. NLRB,* 122 U.S.App. D.C. 18, 350 F.2d 801 (1965). On remand the Board set the case for hearing before a trial examiner and, upon receipt of the trial examiner's report, dismissed the complaint *See W. A. Boyle, George J. Titler and John Owens,* 179 NLRB 479 (1969). Petitioners now seek review of that dismissal.

In our view, this case is moot. On November 4, 1959, one week before the effective date of Section 8(e), the Joint Industry Contract Committee suspended operation of the PWC and the clause has not been enforced since. Moreover, shortly after the Board first declared the PWC illegal it was replaced in the National Bituminous

Coal Wage Agreement by the so-called "80-cent clause."[3] Thus the PWC presently appears in no contract and has no effect on the primary conduct of any party. "When events during the pendency of the appeal have eliminated any possibility that the court's order may grant meaningful relief affecting the controversy that precipitated the litigation, applicable doctrine permits, and judicial administration generally calls for, dismissal of the appeal." *Alton & Southern Ry. Co. v. Int. Assn. of Machinists & Aerospace Workers,* —— U.S.App.D.C. ——, ——, —— F.2d ——, —— (No. 24,217, decided April 11, 1972) (slip opinion at 9). We therefore think the issue of the PWC's validity lacks the immediacy of a live controversy calling for judicial resolution. *See, e.g., SEC v. Medical Committee for Human Rights,* 404 U.S. 403 (1972). If the union subsequently attempts to insert the PWC in a later contract or if some party later attempts to assert rights derived from the PWC, there will be time enough then to consider the difficult issues which it poses. *Cf. Golden v. Zwickler,* 394 U.S. 103 (1969).

II. *Nos. 21,129 & 21,226*

As indicated above, when the PWC was first declared illegal the union and coal producers quickly moved to replace it with the so-called "80-cent clause" which provided, in effect, for an 80-cent royalty to the union welfare fund for each ton of coal purchased from a non-union coal producer.[4] Independent mine operators

---

3. *See* note 4 *infra.*

4. The 80-cent clause provides, in relevant part:

"During the life of this agreement there shall be paid into [the union welfare fund] by each operator signatory hereto the sum of forty cents (40¢)

again challenged this clause as violative of Section 8(e), and the Board initially upheld their claim and issued a cease and desist order. *See Int. Union, United Mine Workers*, 165 NLRB 467 (1967). The union's petition for review (No. 21,129) and the Board's cross-petition for enforcement (No. 21,226) were then consolidated in this court, and in *Int. Union, United Mine Workers v. NLRB*, 130 U.S.App.D.C. 244, 399 F.2d 977 (1968), we denied enforcement and remanded the case so the Board could consider whether the 80-cent clause functioned as a lawful surrogate for the PWC.

Pursuant to this remand,[5] the trial examiner held additional hearings and filed proposed findings of fact and conclusions of law holding once again that the 80-cent clause violated Section 8(e). Thereupon the Board reversed both the trial examiner and its previous decision and dismissed the complaint. *See Int. Union, United*

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per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition. * * *"

5. On July 21, 1970, acting pursuant to a petition by the union, we recalled our mandate solely for the purpose of directing the Board to complete its reconsideration by Dec. 1, 1970.

Mine Workers, 188 NLRB No. 121 (1971). With the cases in this posture we ordered, *sua sponte,* that Nos. 21,129 and 21,226 be consolidated with No. 23,947 (the PWC case) for review.

Shortly after this court's consolidation order, Dixie Mining Company, one of the charging parties, moved to vacate the order and, when this motion was denied, suggested a rehearing *en banc.* Although *en banc* rehearing was also denied, the court noted that the jurisdictional issues raised by Dixie Mining Company "may be considered by the panel when the cases are heard on the merits * * *." We have now given careful consideration to these issues, and we conclude that we lack jurisdiction in Nos. 21,129 and 21,226.

The most salient fact about the 80-cent clause cases is that no party has yet appealed from the Board's second supplemental decision dismissing the Section 8(e) complaint. Accordingly, there is no party aggrieved properly before this court within the meaning of Section 10(f) of the Act which delineates our appellate jurisdiction over the Board.[6] Clearly the union is not

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6. Section 10(f), 29 U.S.C. § 160(f) (1970), provides, in relevant part:

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. * * *"

aggrieved by the Board's order inasmuch as the Board's dismissal of the complaint was the action the union itself requested. The charging parties were aggrieved, but they have not as yet decided to file an appeal and obviously we cannot compel them to do so.

To be sure, this court had jurisdiction over the 80-cent clause cases when the union appealed from the Board's initial unfair labor practice finding. But our unqualified remand in that case operated to divest us of jurisdiction. *See NLRB v. Wilder Manufacturing Co.*, —— U.S.App. D.C. ——, 454 F.2d 995 (1971); *Greater Boston Television Corp. v. FCC*, —— U.S.App.D.C. ——, —— F.2d —— (Nos. 17,785, 17,788, 23,154, 23,159 & 23,172, decided December 29, 1971). Having lost jurisdiction, absent extraordinary circumstances we cannot now regain it until a proper appeal has been perfected. Accordingly, Nos. 21,129 and 21,226, as well as No. 23,-947, must be dismissed.

So ordered.

APPENDIX C

Opinion and Order of the National Labor Relations Board

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA

and

BITUMINOUS COAL OPERATORS ASSOCIATION

Case 5-CE-8

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and

DIXIE MINING COMPANY
UNITED MINE WORKERS OF AMERICA AND ITS DISTRICT 17

Cases 5-CE-9-1 thru 2 5-CC-282-1 thru 2 (formerly Cases 9-CE-12-1 thru 2 9-CC-342-1 thru 2)

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and

DAN S. DAVISON
UNITED MINE WORKERS OF AMERICA, ITS DISTRICT 17, ITS DISTRICT 28, ITS LOCAL 6594, ITS LOCAL 6937, R. R. HUMPHREY AND CARSON HIBBITTS

and

AMES COAL COMPANY AND BUCHANAN COUNTY COAL CORPORATION

Case 5-CC-294 (formerly Cases 9-CC-347-1 thru 7)

Supplemental Decision and Order

On June 16, 1967, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding, concluding, *inter alia*, that the 80-cent provision in the 1964 amendments to the National Bituminous Coal Wage Agreement of 1950 is an agreement prohibited by Section 8(e), and ordering Respondents to cease and desist from (a) maintaining, enforcing, or giving effect to the clause and (b) entering into, maintaining, giving effect to, or enforcing any other contract or agreement, expressed or implied, whereby any signatory operator ceases or refrains, or agrees to cease or refrain, from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or from doing business with any other person, in violation of Section 8(e) of the Act.[1]

On July 2, 1968, the United States Court of Appeals for the District of Columbia Circuit remanded the case to the Board for further consideration.[2] Subsequently the Board, pursuant to the court's remand, remanded the case to the Regional Director for Region 5 with instructions that a hearing be held before a Trial Examiner, for the purposes of entering findings and conclusions, and to recommend an appropriate order, after hearing evidence on three issues which are set forth in the attached Trial Examiner's Decision.

On November 27, 1970, Trial Examiner Samuel M. Singer issued his decision in the above-entitled proceeding, finding that Respondents had engaged in the un-

1. 165 NLRB 467.
2. 399 F.2d 977.

fair labor practices alleged in the complaint and recommending that the Board reaffirm its conclusions and order as set forth in the original proceeding, 165 NLRB 467. Thereafter, the General Counsel, Respondent United Mine Workers, Charging Party Dixie Mining Company, and Charging Party Dan S. Davison filed exceptions to the Trial Examiner's Decision and supporting briefs.[3]

The Board has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.[4] The Board has considered the Trial Examiner's Decision, the exceptions and briefs, its earlier Decision, the court's remand order, and the entire record in this case,

3. Thereafter, several steel producing companies (United States Steel Corporation; Bethlehem Steel Corporation; Jones & Laughlin Steel Corporation; Republic Steel Corporation; C F & I Steel Corporation; Inland Steel Corporation; and Youngstown Sheet and Tube Corporation) filed a request for leave to file exceptions, the time for filing having expired, together with exception and a supporting brief. The request for leave to file these exceptions is hereby denied as these companies are not parties to the proceeding before the Board. However, the Board has determined that the brief is in the nature of an *amicus curiae* brief and has considered it on that basis.

4. The remanded hearing was opened by Trial Examiner Paul E. Weil. After 2 days of hearings Trial Examiner Weil disqualified himself. The evidence received by him on August 25 and 26 was stipulated into the record when the hearing was resumed on September 16, 1970. Our review and affirmance of the rulings of the Trial Examiner include the rulings of both Trial Examiner Weil and Trial Examiner Singer.

and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified hereinafter.

The Court of Appeals remanded this case to the Board for further consideration as to the intent of the parties in agreeing to the 80-cent clause and for a determination as to the validity of the 80-cent clause as a substitute for the Protective Wage Clause (PWC), the union standards clause which it replaced.[5] In agreement with the Trial Examiner we find that the evidence in this case establishes: (1) that the intent of the parties in adopting the 80-cent clause was to equalize the differences in the costs of wage and fringe benefits generally existing between mines signatory to the National Bituminous Coal Wage Agreement and those which are not in order to protect the work opportunities and standards provided UMW members employed by signatory operators; (2) that wage, fringe, and working condition standards of employees in nonsignatory mines are generally lower than those established in the National Bituminous Coal Wage Agreement; and (3) that the 80-cent payment to which signatories are obligated on nonsignatory coal purchases bears a reasonable relationship to the wage and fringe benefit differentials between employees of signatory and nonsignatory oper-

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5. In essence the PWC provided that operators agreed that all bituminous coal mined, produced, or prepared by them, or any of them, be acquired by them, or any of them, under a subcontract arrangement shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in the contract.

ators. In making this third finding we find in agreement with the Trial Examiner that this relationship is to be determined by the hourly wages and the fringe benefits received by the employees and not by the unit costs, or per ton costs, of production as urged by the General Counsel and the Charging Parties.[6] On the basis of these findings, we conclude that the 80-cent clause functions as a union standards clause in protecting and preserving the work of employees working under the UMW agreement and the standards under which such work is performed by removing the economic incentive to subcontract such work stemming

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6. However, even if we were to resolve the issue on the basis of the per ton labor cost we would still find that the differential between signatory and nonsignatory operators bears a reasonable relationship to the wage and fringe benefit differential in terms of the "broad equation" suggested by the Court of Appeals. In doing so we agree with the Trial Examiner that Dixie witness Abraham's analysis is defective, for the reasons stated by the Trial Examiner, and with the General Counsel and Charging Parties that the Trial Examiner's analysis is defective in that he fails to take into account the fact that nonsignatory mines are, in general, less efficient than signatory mines. However, while both Abraham's analysis and the Trial Examiner's analysis are defective, the extent of the defects in each analysis cannot be determined and therefore the precise per ton costs cannot be ascertained. Despite this difficulty, the two differing results tend to establish the possible range within which the actual cost would be found. We note that the figure agreed to by the parties to the national agreement is very near the midpoint of the range. Thus, although the data available is imprecise, we conclude that even on the basis of per ton costs the differential agreed to by the parties bears a reasonable relationship to the actual difference in costs.

from the lower wage and fringe benefit costs of nonsignatory mines. In the light of that conclusion we do not agree with, and therefore do not adopt, the Trial Examiner's conclusion that because there exists a multiplicity of bargaining units under the UMW agreement "the 80-cent clause was neither intended to function, nor functioned, to protect work 'fairly claimable' by a particular bargaining unit."

The validity of a union standards clause lies in the fact that it removes the economic incentive to subcontract unit work to employers maintaining substandard conditions of employment which enable such employers to perform the work at cheaper labor costs. By removal of the economic incentive, a union standards clause protects and preserves unit work precisely to the extent that the economic incentive to subcontracting is the compelling consideration. Under any union standards clause, the signatory employer is not restrained from subcontracting work to employers in another bargaining unit covered by similar wage contractual provisions. Such subcontracts may of course be made for other than economic reasons; however, the fact that such subcontracting is permitted does not detract from the fact that the object of such clause is to preserve and protect unit work. This was as true of the PWC as it is of the 80-cent clause. Accordingly, we find that the existence of a multiplicity of bargaining units does not preclude the 80-cent clause from functioning as a union standards clause as it was intended to do.[7]

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7. Member Jenkins does not adopt any inference that, so far as the clause and the Welfare Fund are concerned, there is a "multiplicity of bargaining units."

Nor do we find the other considerations relied upon by the Trial Examiner as militating against our conclusion. The fact that some signatories have ceased buying coal from nonsignatories in order to avoid the 80-cent payment imposed by the contract merely bears out the fact the clause does in fact remove the economic incentive to purchase coal mined under substandard conditions of employment. This is, of course, a valid function of a union standards clause. Nor, as we noted in *Galligan*, does the fact that some nonsignatory operators may have been encouraged to become signatories to improve the marketability of their coal detract from the validity of the clause.[8] Similarly, the fact that the clause as written would appear to impose an 80-cent payment on coal purchased from Mid-Continent Coal Company, shown on the record to maintain roughly comparable standards, is not a sufficient basis for finding the clause to be unlawful. The record shows that the contracting parties decided upon the imposition of the 80-cent payment on coal on which the 40-cent-per-ton royalty has not been paid as a means of equalizing the costs of production of coal whether or not it was produced under the contract and that the 80-cent payment does in general equalize such costs. It is to be expected that a broad equation designed to equalize costs in an industry of diverse production units

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8. If such operators after becoming signatories failed, with either UMW approval or acquiescence, to establish or maintain union standards the clause might be viewed as a union signatory clause as applied to them. However, as the Trial Examiner found, the record does not support Dixie Mining Company's contention that the UMW authorized any signatory operator to do less than comply with the terms of the agreement.

will not bear exactly equally upon every one in the industry. Moreover, insofar as this record shows, only one nonsignatory operator, Mid-Continent, can be said to maintain standards roughly comparable to the standards established in the UMW agreement. And while it is true that the clause can be read as imposing an 80-cent payment on coal purchased from Mid-Continent, the record also shows that Mid-Continent does not sell coal to signatories to the instant agreement as it sells all of its coal to steel companies.[9] Accordingly, we are unwilling to find that the evidence concerning Mid-Continent and possible application of the 80-cent clause to purchase from it requires a finding that the clause, which in other respects functions as a union standards clause for the ostensible purpose of preserving and protecting unit work, is invalid.

Finally, there remains the question of whether the failure of the clause to distinguish between "supplemental" (coal of a type or quality which could not be produced by the purchasing signatory or by a signatory in his bargaining unit) and "substitute" (coal which could be produced from the properties of the purchasing signatory or from those controlled by other signatories in his bargaining unit) coal requires a finding that it is not limited to preserving work germane

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9. The steel company contracts with the UMW do contain a clause providing that if during the life of the agreement the 80-cent clause is found lawful by the court of last resort the steel companies will bargain with the UMW as to what action may be appropriate under the then existing contract.

to the economic integrity of the unit.[10] The record does not contain any evidence which would show that the incidence of the purchase of supplemental coal is other than *de minimis*. Accordingly, for the reasons stated in *Galligan*, we conclude that the possible application of the 80-cent clause to supplemental coal is insufficient to establish that the parties entered into the clause for a secondary object or that the failure to distinguish between substitute coal and supplemental coal gives the clause wider application than necessary to preserve and protect unit work and standards.[11]

Accordingly, we find that the 80-cent clause does not contravene Section 8(e), and we shall dismiss the complaint.[12]

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10. As the decisions in *Galligan* make clear, it is only with respect to this issue that the scope of the bargaining unit or units becomes relevant to a determination of whether a union standards clause may be said to protect work beyond or outside of a particular bargaining unit.

11. While Member Kennedy views the conclusions reached in this case warranted on the facts adduced under the limited scope of the record, he would limit the decision to the peculiar facts of this case.

12. As the allegations of Sec. 8 (b) (4) (i), (ii) (A) and (b) violations are dependent on our finding that the 80-cent clause violates Sec. 8(e), we shall also dismiss these allegations of the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, and upon the entire record in this case, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. Feb. 26, 1971

JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member
RALPH E. KENNEDY, Member
[SEAL] NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MILLER and MEMBER BROWN, dissenting:

We cannot agree with our colleagues that the clause in dispute is lawful. We are dealing here with Section 8(e), which requires that we construe contractual language adopted by the parties. The lawfulness of the clause does not depend upon the parties' subjective intent in executing the clause or upon their conduct in enforcing it, although the latter is properly our concern under Section 8(b)(4)(A). Thus, where the practical effect of contractual language comprehends a prohibited objective which is not merely incidental to protection of the employees of the contracting employer,[13] it is unlawful even though not enforced in an illegal fashion. Conversely, a clause may be lawful on its face

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13. "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." *National Woodwork Manufacturers Association, et al. v N.L.R.B.*, 386 U.S. 612.

but the conduct of the parties may reveal an understanding and interpretation which is outside the statutory protection.[14]

We are persuaded that the 80-cent clause is an implied union signatory clause, and not a union standards clause as found by our colleagues. Clearly, as the Mid-Continent example demonstrates, signatories are required to make the 80-cent payment on coal purchased from nonsignatories even though the wage and fringe benefit standards of the nonsignatory may be comparable to or even better than those established in the UMW contract,[15] while no such payment is imposed on coal purchased from signatories. This view is strengthened by the fact that the clause operates to prohibit the contracting employers from purchasing even supplementary coal, that is, coal of a type or quantity which could not be produced by their own employees. At least

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14. See the general discussion of principles in *Local Union No. 26, Sheet Metal Workers (Reno Employers Council)*, 168 NLRB 893, 898-899.

15. The 80-cent payment is imposed on coal on which the normal 40-cent-per-ton royalty has not been paid into the UMW welfare fund. Of course, such 40-cent payment is made only on coal mined under UMW contracts. Were the clause to require the 80-cent payment on all coal purchased from producers who maintain conditions of employment less favorable to employees than those established in the UMW contract, a different answer might be required. Accordingly, it is clear that notwithstanding Mid-Continent's working conditions, the 80-cent payment would have to be made if the signatory employers made purchases from that firm, and since it is used merely as an example of the application of the clause it is immaterial that in fact Mid-Continent sells only to steel companies.

to that extent the clause has a secondary thrust extending beyond the protection of area standards, or the preservation of unit work or of work fairly claimable by the employees covered by the contract. Accordingly, even though we accept the Trial Examiner's findings that the parties adopted the clause in order to equalize the wage and fringe benefit costs of signatories and nonsignatories, we must find that the parties have failed to embody their purpose in language that operates in a lawful manner.[16] Therefore, notwithstanding the holding of the *Galligan* decision and other related prior holdings, we would find the clause herein to be violative of Section 8(e).

Dated, Washington, D.C. Feb. 26, 1971.

EDWARD B. MILLER, Chairman
GERALD A. BROWN, Member
NATIONAL LABOR RELATIONS BOARD

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16. We agree with the Trial Examiner that:

> The evidence adduced in the remand proceeding does not detract from the findings and conclusions of the Board in the earlier proceeding, premised upon the Board's undisturbed determination that the various bargaining units (and not a single industry-wide unit) are the sole units for which the Union may seek to preserve work opportunities and standards. The record developed in the instant hearing was devoted to an inquiry on the wage and fringe benefit differentials between signatory and nonsignatory mines and also the intent of the parties in adopting the 80-cent clause, rather than to the secondary impact of the clause.

Trial Examiner's Supplemental Decision

STATEMENT OF THE CASE

SAMUEL M. SINGER, Trial Examiner: This proceeding was tried before me in Washington, D.C. on various dates between August 25 and September 29, 1970, pursuant to an Order of the Board, issued April 24, 1970, reopening the record for the purpose of receiving evidence on issues enumerated in its order.[1]

All parties appeared and were afforded full opportunity to be heard and to examine and cross-examine witnesses. Their briefs were received on October 23, 1970.[2]

Upon the entire record,[3] the briefs, and my observation of the testimonial demeanor of the witnesses, I make the following:

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1. The remanded hearing, originally opened by another Trial Examiner on August 25, was closed on August 27, 1970, after that Trial Examiner disqualified himself. The evidence received by him on August 25 and 26 was stipulated into the record when the hearing resumed on September 16, 1970.

2. The post-hearing motion of Mid-Continent Coal and Coke Company to file a brief amicus is hereby granted. Evidence relating to Mid-Continent's operation was received at the remanded hearing.

3. Transcript corrected by my orders dated November 9 and 19, 1970.

Trial Examiner's Supplemental Decision.

SUPPLEMENTAL FINDINGS OF FACT

A. Background and History of the Proceeding; the Issues Involved

1. Introduction

The basic issue in this proceeding concerns the legality, under Section 8(e) of the Act, of the "80-cent clause" incorporated into the National Bituminous Coal Wage Agreement of 1950 (as amended in 1964), successor to the Protective Wage Clause established in that Agreement.[4] The 80-cent clause in essence requires a signatory to the National Agreement to pay 80 cents a ton royalty into the United Mine Workers ("UMW") Welfare and Retirement Fund on all bituminous coal "purchased or acquired" for use or sale from nonsignatory operators; the welfare-retirement royalty is only 40 cents per ton for coal produced by or acquired from signatories.[5]

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4. Section 10(e), the so-called hot-cargo provision, makes it an unfair labor practice for a labor organization and employer "to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person."

5. Insofar as here pertinent, the 80-cent clause, effective April 2, 1964, provides:

> During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forty cents (40 cents) per ton of two thousand (2000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for

Trial Examiner's Supplemental Decision.

The Protective Wage Clause ("PWC"), incorporated into the National Agreement in 1958, required that all coal mined or procured by signatories through subcontracts "be mined or produced under terms and conditions which are as favorable to the employees as those provided for in this contract."[6] Both clauses have been the subject of long and intensive litigation before the Board, the United States Court of Appeals for the District of Columbia Circuit, and in civil actions before United States District Courts. As presently indicated, the Board considered PWC in three proceedings, concluding in the first two that it was not lawful and in

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sale (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80 cents) per ton of two thousand (2000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40 cents) per ton had not been paid into said Fund prior to such procurement or acquisition.

6. Insofar as pertinent, the Protective Wage Clause read: "It is recognized that when signatory operators mine, prepare, or procure or acquire under subcontract arrangements, bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the Operators agree that all bituminous coal mined, produced, or prepared by them, of any of them . . . under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract."

the third that it was. The 80-cent clause was twice considered by the Board and both times found unlawful. The Court of Appeals has reviewed each of the clauses once, each time remanding the proceeding for the receipt of additional evidence and for further consideration.[7] The considerable litigation involved and the division of the Board itself on the posed issues attest to the complexity and closeness of the questions involved.[8]

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7. For non-Board cases in which PWC and the 80-cent clauses were involved or commented on see, e.g., *Lewis v. Pennington*, 257 F. Supp. 815, 821-825 (E.D. Tenn.); *Lewis v. Pennington*, 400 F. 2d 806 (C.A. 6); *Ramsey v. U.M.W.*, 265 F. Supp. 388 (E.D. Tenn.). See also *U.M.W. v. Pennington*, 381 U.S. 657. In *Riverton Coal Company v. U.M.W.*, Civil Action Nos. 5805 and 6730, the United States District Court for the Southern District of Ohio (W.D.), recently determined that Riverton (an affiliate of Charging Party Davison) was not entitled to damages sustained from the 80-cent clause; Judge Hogan concluded that that clause did not run "afoul" of Section 8(e) of the Act. The District Court's findings and conclusions are not binding in this proceeding. *W. W. Wallwork Fargo, Inc.*, 123 NLRB 91, 113, fn. 33.

8. Counsel for all parties are to be commended for the comprehensive and helpful briefs submitted, particularly in view of the limited time afforded to prepare them in order to help meet the deadline set by the Court of Appeals for completion of these proceedings. In addition to the over 2,000 pages of testimony adduced in the original and remanded hearings, the record includes voluminous exhibits — much of it economic and statistical data.

Trial Examiner's Supplemental Decision.

2. History of the Proceedings

In its first decision on PWC, issued August 27, 1963, a 3-member panel of the Board (one member dissenting) held that PWC contravened Section 8(e) of the Act. *Raymond O. Lewis, et al. (Arthur J. Galligan)*, 144 NLRB 228.[9] On September 20, 1963, the Board denied a motion to reconsider that decision *en banc*, indicating it had been "unable to arrive at a majority decision disposing of the matter."[10] Thereafter, another motion was filed by UMW, requesting the Board to declare valid and lawful the then recently negotiated 80-cent clause, which, it was alleged, "fully and completely supplants and supersedes" PWC. On August 7, 1964, the Board (one member dissenting) held, on the basis of a stipulated record, that the 80-cent clause was likewise illegal and, accordingly, denied the Union's request that it be adjudged in compliance with the order entered in 144 NLRB 228. See *Galligan*, 148 NLRB 249. Rejecting the Union's contention that the 80-cent clause was "lawful because its purpose is to preserve and protect the work of employees in the industry-wide unit" (148 NLRB at 253), the majority stated that on the basis of the "statements of the negotiating parties as to the purpose and impact of the clause, and in view of the economic and industrial realities obtaining in the coal mining industry as set forth in the stipulated record, we find that the clause imposes a substantial hardship upon Signatory Operators who procure or acquire

9. Hereafter referred to as *Galligan*.

10. See Trial Examiner A. Bruce Hunt's Decision in the original hearing in this case, 165 NLRB 467, 471, fn. 6.

coal from nonsignatory sources, a penalty which is not imposed if they procure or acquire coal from other signatory Operators." (*Id.* at 252-53.) Accordingly, the Board concluded that "realistically appraised [the 80-cent clause] is nothing more than an implied union signatory agreement restricting subcontracting of work to operators under contract with the UMW, without regard to unit considerations." (*Id.* at 255). The dissenting member (Member Jenkins) would have held the 80-cent clause valid as a lawful work-preservation and union-standards clause since, in his view, the object of the clause was to restrict purchases from and subcontracting to operators "who can produce more cheaply because of lower wages and lower standards of benefits" and since the clause "does assure that a welfare fund royalty will be paid on *all* coal the production of which is subcontracted by any Signatory Employer as well as upon coal produced by that Employer itself." (*Id.* at 257.)

The Board again reviewed the legality of the 80-cent clause in the instant proceeding, after a hearing conducted by Trial Examiner A. Bruce Hunt.[11] As Trial Examiner Hunt noted in his decision, he and the

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11. The main charging parties in this case are Dixie Mining Company ("Dixie"), a nonsignatory, and Dan S. Davison ("Davison"), a signatory to the National Agreement. The latter signed the National Agreement negotiated between UMW and the Bituminous Coal Operators Association ("BCOA") after separate "negotiations." The unfair labor pracitce charges filed by Davison with the Ninth Region of the Board were consolidated with others filed with the Fifth Region. The instant proceeding will sometimes be referred to as *Dixie*.

parties had been "advised" that the Board did not "regard" the decision in 148 NLRB 249, *supra,* based on a stipulated record, "as finally disposing of" the issue. (165 NLRB 467, 470.)) On March 17, 1966, the Board, affirming the Trial Examiner, reaffirmed its previous determination in 148 NLRB 249 that the 80-cent clause was unlawful under Section 8(e) of the Act, stating that: "construed in the light of the economic realities of the bituminous coal industry, the clause constitutes an implied agreement between the Union and signatory operators that the signatory operators will purchase coal only from other signatory operators." (165 NLRB at 467). The Board also said (*Id.* at 468):

> under the clause in this case, a producer could purchase coal from any signatory operator, regardless of whether the latter is within the producer's own employer association (bargaining unit), without being required to make the 80-cent payment. Therefore, since the operators from whom he might obtain additional coal — be it supplemental or substitute — without the penalty are not limited to those within the unit, the clause cannot be said to preserve work opportunities for employees in that unit. Nor does the 80-cent penalty clause qualify as a wage-standards provision designed to prevent the undermining of established working conditions in the principal work unit . . . because a penalty is imposed whenever unit work is subcontracted to nonsignatory operators without regard to the wage standards of such employers.[12]

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12. The Board in the instant case (*Dixie*), as previously in *Galligan,* found the appropriate units to

Member Jenkins again dissented for the reasons he previously stated in *Galligan*, emphasizing that in his view "there exists a single industry-wide bargaining unit for welfare fund matters." that the majority's conclusion does not comport with prior Board holdings that "the disruption of long-established business relationships was a circumstance sufficient to establish an unlawful secondary object within the intent of Section 8(e)," and that the Board's decision "can stand only if in determining the legality of the clause we substitute our judgment for that of the Union as to what the amount of compensation to the welfare fund should be to equalize the wage standards throughout the industry and protect the integrity of the industrywide welfare fund." (165 NLRB at 469.)[13]

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be a multiemployer association unit (e.g., BCOA) or a single employer unit (e.g., Davison, *supra*, fn. 11) "for which separate negotiations are conducted with UMW" (*Dixie*, 165 NLRB at 468), rejecting the Union's contention that all signatories to the National Agreements (BCOA, other associations such as Southern Coal Producers Association, and independent operators) constitute a single unit, simply because the agreements they signed (national agreements) contained uniform terms. See also *Galligan*, 148 NLRB 249, 254; and 179 NLRB No. 80, *infra*.) The issue of validity of the Board's unit determination is not presented in this remand proceeding.

13. In addition to finding that the Union and BCOA violated Section 8(e) by entering into the 80-cent clause, the majority found that the Union violated the secondary boycott prohibitions of Section 8(b)(4)(ii)(A) and (B) of the Act by inducing and encouraging employees to strike and by threatening, coercing, and restraining employers with objects of forcing or requiring said employers to become signatories to the 80-cent clause.

Trial Examiner's Supplemental Decision.

In the meantime, the *Galligan* case, involving legality of PWC, came up for review before the Court of Appeals for the District of Columbia (350 F. 2d 801). In a decision issued August 4, 1965, the Court (*per* Chief Judge Bazelon) remanded the case to the Board for further consideration "in light of [other] recent cases" by that court upholding the legality of union-standards clauses so long as they were "germane to the economic integrity of the principal work unit" or sought "to protect and preserve the work and standards [the union] has bargained for." (350 F.2d at 802.) After a supplemental hearing on the question, Trial Examiner Frederick U. Reel on June 20, 1967 issued his decision finding PWC lawful and recommending dismissal of the complaint. (179 NLRB No. 80) Based on the record before him, Trial Examiner Reel concluded that "The avowed purpose of . . . the Protective Wage Clause is directed at restoring employment opportunities to employees covered by the contract which they were losing because cheaper labor was making it more profitable to signatory operators to buy cheap coal than to produce their own. . . . [T]he Protective Wage Clause bears more than an incidental relationship to protecting the work standards set in the basic agreement. . . . [I]t operates to encourage, but not to compel, the unorganized segment of the industry to become signatory to the agreement."

Thereafter, on June 2, 1968, the District of Columbia Circuit remanded to the Board the instant (*Dixie*) case involving the 80-cent clause which had come for review before it. The Court (*per* Chief Judge Bazelon), taking cognizance of Trial Examiner Reel's decision in

Galligan (referred to in the Court's opinion as *Boyle*), which was then pending before the Board, and Member Jenkins' dissenting opinion in *Galligan (supra,* 148 NLRB at 256), stated (399 F. 2d at 980-81):

> Since the 80-cent clause is by everyone's admission and our characterization a substitute for the union standards clause, it is the Board's responsibility to carefully consider whether, in fact, it functions as one. If it is a union standards clause and the Board affirms *Boyle*, the 80-cent union standards clause would seem to be a valid provision. Conceivably the parties could have agreed on a money figure which in their judgment represents a broad equation for the difference in standards throughout an industry of diverse production units.
>
> * * * * * * *
>
> It is true that the Board found that this was not a union standards clause "because a penalty is imposed whenever unit work is subcontracted to nonsignatory employers." But the Board's conclusion is not backstopped by the type of factual support developed by the Examiner in *Boyle*. It also appears contrary to the result in *Boyle*, which suggests that most nonsignatories have subunion wage, fringe and working condition standards.
>
> * * * * * * *
>
> In view of these facts, and the history of the Union's efforts to deal with the problem of substitute coal through a union standards clause and its substitute 80-cent clause, the Board should have made a full inquiry into (1) the intent of the parties making this agreement, and (2) its validity as a surrogate union standards clause.

Trial Examiner's Supplemental Decision.

On November 4, 1969, a majority of the Board affirmed Trial Examiner Reel's decision in *Galligan*, upholding his finding that PWC was valid and lawful. 179 NLRB No. 80.[14] The Board stated:

> The Court of Appeals remanded this case to the Board for consideration of certain issues in the light of the Board's characterization of the Protective Wage Clause as "a union standards clause" and the Court's holding in certain decisions that "such a clause would not ordinarily violate 8(e) so long as it was germane to the economic integrity of the principal work unit; or sought to protect and preserve the work and standards [the Union] has bargained for." (citation omitted) In view of the Trial Examiner's findings and conclusions on the issues remanded to him which we find are supported by the record in this case, we find that the Protective Wage Clause was adopted by the contracting parties in order to protect and preserve the "unit work" of employees covered by the contract by precluding the subcontracting of "unit work" to operators who did not maintain union standards.

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14. The lead opinion was signed by Members Fanning and Brown; Member Jenkins concurred, relying on his earlier (then dissenting) opinion in *Galligan* (*supra*, 148 NLRB 249) that PWC (predecessor of the 80-cent clause) "had a work protection object and did not violate the Act." The then Chairman (McCulloch) dissented, being of the view that the General Counsel had adduced sufficient evidence to show a *prima facie* case that PWC had prohibited objectives and that it was up to Respondents to rebut this by establishing work-preservation and work-standards functions. An appeal from the Board's decision is pending before the District of Columbia Circuit. *sub nom, Dixie Mining Company v. N.L.R.B.*, No. 23,947.

Trial Examiner's Supplemental Decision.

In conformity with the Court's decision in the instant (*Dixie*) case, the Board on April 24, 1970 ordered that the record be reopened and a hearing be held by a Trial Examiner to receive evidence on the following three issues:

(1) the intent of the parties in adopting the 80-cent clause

(2) whether the wage, fringe and working condition standards of employees of nonsignatory coal operators are generally lower than those established under the National Bituminous Coal Wage Agreement; and

(3) whether the 80-cent payment bears a reasonable relationship to such differential as may exist.

The Board further directed that, unless the parties waived their rights thereto, the Trial Examiner enter findings and conclusions, and make appropriate recommendations, based on the evidence received in the remanded hearing, the record previously made, and the opinion of the Court of Appeals.

B. The Remanded Issues

1. Introduction

In accordance with the Board's remand order, evidence was adduced in the reopened hearing bearing on (1) intent of the parties in adopting the 80-cent clause; (2) the differentials, if any, in wages, fringe and working standards "generally" prevailing among signatory and nonsignatory employees; and (3) reasonableness of

the 80-cent payment (to the UMW Welfare Fund) to such differential as may exist. All three issues appear to be interrelated—all bearing on the objective of the 80-cent clause. Thus, as to (2) and (3), if the differentials in wages and benefits approximate 80 cents, then a reasonable relationship is established warranting the inference that the object of the 80-cent clause was to preserve work and protect work standards by equalizing labor costs and benefits in the two sectors of the coal industry (signatory and nonsignatory mines). On the other hand, if the differentials are significantly lower, it may properly be inferred that a penalty was contemplated to compel nonsignatories to sign the National Agreement or else, cease doing business with the signatories.

As indicated below (sec. B. 2) the evidence on "intent" is largely confined to the testimony of UMW official (John Owens) concerning the negotiations leading to the inclusion of the 80-cent clause in the April 1964 UMW-BCOA collective agreement. As also indicated, based on that testimony (to the extent credited) and the generally well-known economic facts of the coal industry when the clause was adopted, it is found that the 80-cent clause was intended to offset differences in wages and fringe benefits *generally* existing between signatory and nonsignatory operators in order to preserve the work opportunities and standards of UMW members and employees covered by the National Agreement with BCOA and other operators in the coal industry. As further indicated (sec. B. 3 and 4), the evidence on the differentials involved and their relationship to the 80-cent payments consists largely of eco-

nomic and statistical data and, to some extent, of testimony of witnesses. While all parties agree that there are demonstrable differentials, they differ as to the magnitude thereof and as to whether the 80-cent clause is a reasonable equalizer. For reasons to be indicated, it is found that although no precise figures are ascertainable, the differentials between signatory and nonsignatory wages and benefits, particularly during the most relevant period here in question (1962-1963) — just prior to adoption of the clause involved — closely approximated 80 cents.

In my considered opinion, these findings on the remanded issues are not, however, dispositive of the ultimate issue in this case, namely, whether the 80-cent clause is a valid work-preservation and union standards clause or an invalid signatory clause, aimed at eliminating or restricting signatory subcontracting to, and purchases from, nonsignatories. The Board's order directs me to make findings and conclusions based on the records developed in both this and in the original hearing, in the light of applicable legal principles. As I see it, the record developed in the reopened hearing relates primarily to only one of the findings of Trial Examiner Hunt (approved by the Board), *viz,* that there was no evidence in the original record that "the Union's initial proposal, or the contract figure of 80 cents, or any other figure could be reasonable compensation" to the Union for differences between signatory and nonsignatory wages and benefits to support UMW's "contention that the 80-cent provision is intended to protect employees' job opportunities." (165 NLRB at 476-477.) Since it is here now found that "reasonable com-

pensation" did exist to justify a finding that work preservation (as well as union standards protection) was an objective, I must still pass on the question whether the 80-cent clause fails to meet the test of validity on other grounds. Trial Examiner Hunt and the Board found the clause illegal on the grounds: (1) even if qualifying as a work-preservation and union-standards provision, the 80-cent clause was aimed at protecting UMW members generally rather than members of particular bargaining units; (2) the 80-cent "penalty" was imposed "whenever unit work is subcontracted to nonsignatory operators without regard to the wage standards of such employers" (165 NLRB at 468); and (3) that, viewed in the light of "the economics of the bituminous coal industry," the clause has foreseeable and serious secondary effects "causing nonsignatories to become signatories or to lose signatories as a market for their coal." (165 NLRB at 477.) The Court of Appeals did not reach any of these questions; nor would it have had to if it were found that the 80-cent payment had no reasonable relationship to the wage and benefit differentials between signatory and nonsignatory mines. For reasons to be shown (sec. C) the evidence introduced in the renewed hearing fortifies the correctness of the original Board decision that the 80-cent clause does not meet the test of validity, principally because it was designed to function, and functions, to protect work opportunities and standards *beyond the established bargaining units*. Under Board law, the units for which a union may lawfully seek such protection are confined to the appropriate units for collective bargaining established under Section 9 of the Act.

Trial Examiner's Supplemental Decision.

2. INTENT OF THE PARTIES IN ADOPTING THE 80-CENT CLAUSE

As Trial Examiner Hunt found (165 NLRB at 471-472), the UMW-BCOA negotiations on the 1964 collective agreement began in December 1963, about 4 months after the Board initially found PWC invalid, and terminated on March 23, 1964. Only UMW Secretary-Treasurer John Owens testified on the genesis of the 80-cent clause in the original hearing. According to Owens, the three union negotiators first discussed among themselves a proposal to demand $1 a ton royalty on nonsignatory coal. Owens testified that the "purpose" of the proposal was "to preserve as far as possible the job opportunities of our members under the terms of the contract and to prevent as far as possible . . . contracting or subcontracting out of work by coal operators that signed the agreement." Further, according to Owens, the three BCOA representatives "absolutely" opposed the Union's demand. Ultimately, the operators agreed to the Union's reduced 80-cent proposal in lieu of PWC. According to Owens, the Union believed that this figure would "reasonably compensate [the members] for work lost and protect their equity in the Welfare Fund." Trial Examiner Hunt found that Owens' testimony "shed[s] little, if any, light on the details of the negotiations which resulted in adoption of the 80-cent provision." (165 NLRB at 471-72.)[15]

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15. Trial Examiner Hunt believed that Owens had "withheld information concerning the negotiations" and characterized him as "not a candid witness." (165 NLRB at 472.)

Trial Examiner's Supplemental Decision.

At the remand hearing, Owens again was the only witness to testify on the 80-cent clause.[16] This time, Owens supplied more details, including the economic considerations which led to the Union's initial $1 proposal and the manner in which the $1 figure was computed. As before, Owens stressed the work-opportunity objective of the clause, stating that "the primary purpose of it was to protect the wage standard of the coal miners who were signatory coal operators and the work opportunity that provided for [sic] under the contract; and to protect the fringe benefits; and to build up an equity when these men are superannuated and they become so they can no longer labor in the coal mines. . . ." He explained that when (in August 1963) the Board declared PWC "illegal" it was decided "to negotiate a new section that would protect our people" from signatory operators' practices of "leasing, subleasing and buying coal from nonsignatory operators" and, to this extent, "keeping their mines idle." According to Owens, the "sub-leasing and sub-contracting" signatories were paying $7 to $10 a day less wages than called for in the previous (1958) collective agreement and were avoiding the 40-cent per ton royalty provided therein. He also testified that these arrangements "destroyed the work time" of the Union miners and so idled them that their work days in 1963 dropped to less than 200 days.

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16. Although, as indicated, at least two other Union and several BCOA representatives participated in the negotiations, unexplainedly none was called to testify; Respondent BCOA and Charging Parties called no one to contradict Owens.

As to the $1 royalty initially proposed by the Union, Owens testified that the figure was computed as follows: (1) the average wage cost differential between signatory and nonsignatory coal was $7 to $10 per day; (2) the average welfare payment differential, determined by multiplying 40 cents by 14 (the average tons per man day mine output), was $5.60; (3) adding a $9 a day wage differential (a figure between $7 and $10) to the $5.60 welfare differential amounted to approximately $14 per day; and (4) the resulting $14 difference in cost was the equivalent of $1 per ton.

Contending that Owens in the original hearing was strangely silent about the mathematical computation which allegedly led the Union to propose the $1 figure, although ample opportunity to describe this had been afforded him, Dixie characterizes Owens' explanation (br. p. 39) as an "*ad hoc* rationalization." General Counsel and Davison likewise attack Owens' credibility, contending that his testimony was "just as incredible" at this hearing as in the first. On the other hand, the Union contends that Owens was not *specifically* asked how the $1 or 80-cent figure was derived in the original hearing. I am of the view that Owens had more than ample opportunity to expound the mathematical basis for the $1 figure in answer to the many questions propounded him on the origin of the Union's royalty proposal.[17] Be that as it may —

17. However, contrary to Dixie's (br. 39) and Davison's (br. 13) suggestion that the mathematical formula was first advanced at the instant hearing, years after the first, it appears, as General Counsel in his brief (p. 15) concedes, that the formula was described in the Union's exceptions to Trial Examiner Hunt's decision, filed in April 1966.

whether or not the mathematical formula Owens explicated is an afterthought — one thing is clear: Owens, who had been associated with UMW since 1901 (the past two decades as its secretary-treasurer), was sufficiently familiar with wages generally being paid in the coal industry to make a realistic estimate of labor cost without resorting to statistical sources or elaborate economic analysis. He has been one of the Union's three chief negotiators and has participated in all except one national wage conference since 1921. His year-round duties include consulting with all types of coal operators and familiarizing himself with trade publications and governmental data dealing with the industry. He receives from UMW District representatives periodic reports on working conditions at nonsignatory as well as signatory mines. I am convinced that whether or not Owens actually went through the process of devising the formula about which he testified prior to proposing the $1 (and later 80-cent) proposal, is immaterial.

I am equally convinced, as Owens testified, that in making its $1 proposal in the negotiations (it was first made in January 1964), the Union was very much concerned with the problem of preventing signatory producers from subcontracting work to nonsignatories, including producers to whom signatories sublease their lands. The problem was by no means new. As Trial Examiner Hunt noted in his decision, "The practice of operators who are signatories to agreements with the Union in purchasing coal, called 'subcontracting' or 'contracting out,' has long been a matter of concern to the Union." (165 NLRB at 471.) Trial Examiner Hunt detailed the various clauses incorporated in contracts

since 1941 to meet the problem — ranging from outright bans against subcontracting to the Protective Wage Clause restricting subcontracting to operators meeting Union standards — the latter invalidated by the Board in August 1963. The economic facts which could reasonably prompt the Union to propose a clause protecting the work opportunities of its members, as a substitute for PWC, were well known to Union and industry. The Board itself took notice of some in its 1963 *Galligan* decision, *supra*, 144 NLRB 228 — including the fact that employment in the industry "has very significantly declined," that there is ever-increasing idleness, that inter-producer purchases are common, and that "labor constitutes the principal cost item." (144 NLRB at 228) As shown below (sec. B 3. a. (i)), shortly before the 1964 negotiations here involved, a published industry wage survey[18] showed an existing $1.13 per hour wage differential ($9.04 for an 8-hour day) between union and nonunion underground employees; and a $1.25 per hour (or $10 per day) differential for those in surface mines. The same survey also showed significant differentials in regard to fringe benefits such as vacations. Owens testified that he was aware of these wage and fringe spreads. Whether or not he was, his proposal (as an industry-wide cost-differential equalizer) appeared to be reasonable from the Union's point of view and was substantiated, at least in hindsight, by the facts.

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18. *Industry Wage Survey, Bituminous Coal Mining*, *infra*, fn. 20, issued September 1963.

Under these circumstances, it is not surprising, as Owens indicated, that the Union's $1 or 80-cent proposal was not the subject of debate in the UMW-BCOA 1964 negotiations. At the outset, the operators opposed it, expressing the view that "it was illegal because the National Labor Relations Board had said the Protective Wage Clause was illegal." Nor did they apparently request the Union to "explain" its reason or basis for the proposal. Owens testified that the Union and BCOA officials had been discussing the economic problems (including existing labor cost differentials) prompting the Union proposal on many prior occasions and that there was no need to detail them during the negotiations. I believe him. Furthermore, Owens indicated that BCOA was not too concerned about the 80-cent clause as such, its primary interest being the cost of the "entire package" (including the 80-cent clause) to be contained in the negotiated contract, as to which BCOA addressed itself (as always in the past) in the final stages of the negotiations; and that it was not until then that BCOA finally accepted the 80-cent figure (reduced from $1) as a compromise. It is reasonable to assume that in acquiescing to the Union's proposal, the industry representatives were as acquainted with the economic facts, including industry-wide labor cost differentials, as were the Union representatives. I so find.

Based on all of the foregoing, including Owens' testimony as to the genesis of the 80-cent clause and the generally well-known economic facts of the bituminous coal industry at the time of adoption of the clause, I find and conclude that the 80-cent clause was intended (1) to offset the differences in wages and fringe benefits generally existing between signatory and nonsigna-

tory operators in the industry — thereby equalizing existing work standards between these groups; (2) to preserve the jobs, and thereby protect work opportunities and standards of UMW members employed by all signatory operators; and (3) to substitute (or serve as a "surrogate") for the PWC in the predecessor collective agreement, which at the time of substitution had been declared illegal by the Board.

3. DIFFERENTIALS IN WAGE, FRINGE AND WORKING CONDITION STANDARDS BETWEEN EMPLOYEES OF SIGNATORY AND NONSIGNATORY OPERATORS

a. *The evidence*

(i) *Wages.* It is undisputed that during the period here involved differentials in average earnings and benefits existed generally as between signatory and nonsignatory mines; only the extent of these differentials is in question. While some testimony was adduced on the prevailing industry-wide differentials, this testimony is unreliable since it is vague, general, and inconsistent; furthermore, it is unsupported by documentary evidence.[19] The record does include official government-

19. Thus, Dixie witness Ratliff only testified that he was "aware" that some differentials existed during the years 1962-1967; at the same time he insisted that the wages in the company with which he was associated were "very similar" to the union wage level. Dixie partner Holcomb testified that during 1964-65, a $10 differential existed between his own wages ($16) and the union scale ($26); his further testimony that current union and nonunion wages "are approximately the same" due to the competitive labor market is unsupported by objective evidence, including economic studies, and I do not credit it.

published data which permit a fair comparison of the average wage rates in unionized (signatory) and nonunionized (nonsignatory) mines during the years 1962-1963 and 1967. Thus, a wage survey on the bituminous coal industry covering industry-wide wages (union and nonunion), issued by the Bureau of Labor Statistics of the United States Department of Labor (General Counsel's Exhibit 4R)[20] shows the following industry-wide wages and wage differentials in November 1962 (and it is fair to assume in all of 1962 and 1963)[20a]:

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20. *Industry Wage Survey, Bituminous Coal Mining, November 1962*, Bureau of Labor Statistics, United States Department of Labor (United States Government Printing Office, September 1963, Tables 3 and 26). The survey is based on a sample consisting of 27 percent of bituminous coal mines in the country, employing 10 or more workers. It covers mines employing 52 percent of all workers in the industry. (See General Counsel's Exhibit 4R, pp. 57-58.) Over 80 percent of the workers covered by the study were employed in mines covered by collective agreements. About 98 percent of the unionized miners were employed in signatory mines (i.e., mines under contract with UMW). (See p. 3 of General Counsel's Exhibit 4R; see also General Counsel's brief p. 5 and Dixie brief p. 27, n. 35.)

20a. In the absence of testimony or evidence to the contrary, it is fair to assume that *nonunion* earnings in 1963 were not notably different than in November 1962. Owens testified that *union* wage increases came only with the 1964 agreement and this is supported by data in General Counsel's Exhibit 3R, p. 10. In any event, there was no narrowing of the wage *differentials* by January 1967. See table 2 above.

Table 1—Wages and Wage Differentials
(November 1962)

Type of Mine	Union Hourly	Nonunion Hourly	Differential (Hourly)
Underground	$3.11	$1.98	$1.13
Surface	3.37	2.12	1.25

A later wage survey (General Counsel's Exhibit 5R) shows that while both union and nonunion industry-wide wages had risen in January 1967, the differential for underground mines ($1.13) remained the same, although it increased somewhat for surface mines (from $1.25 to $1.44 per hour).[21] The 1967 survey shows:

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21. See *Industry Wage Survey, Bituminous Coal Mining, January 1967,* Bureau of Labor Statistics, United States Department of Labor, (United States Government Printing Office, February 1968), Tables 3 and 36. The two Industry Wage Surveys (tables 1 and 2 herein) show earnings in two sectors of the bituminous coal mining industry: (1) underground mines and (2) surface mines. Although both sets of data are presented in this Decision, it is clear that the earnings (and labor costs) in underground mines are far more representative of the industry as a whole than those in surface mines. Underground mines employed 85 percent of the workers covered by the 1962 survey and slightly over 80 percent of those covered by the 1967 survey. (See General Counsel's Exhibit 4R, p. 2, and General Counsel's Exhibit 5R, p. 2) I am accordingly, relying primarily on wage data of underground mines in forming conclusions concerning industry labor cost differentials.

Table 2—Wages and Wage Differentials
(January 1967)

Type of Mine	Union Hourly	Nonunion Hourly	Differential (Hourly)
Underground	$3.52	$2.39	$1.13
Surface	3.80	2.36	1.44

It would appear that the wage differentials between union (signatory) and nonunion (nonsignatory) mines were even greater since the reported wage figures *straight time* hourly earnings, exclusive of premium pay for such items as overtime and late shift work, which normally are higher in union than nonunion mines. The record indicates that UMW collective agreements provide significant benefits in these respects. (See General Counsel's Exhibit 3R, *Wage Chronology, Bituminous Coal Mines, 1933-1968, Bulletin No. 1558*, Bureau of Labor Statistics, United States Department of Labor, United States Government Printing Office, July 1967, 15-16).

(ii) *Fringe benefits.* Although the evidence adduced on fringe benefits (testimonial and documentary) does not permit a finding as to precise differences between union (signatory) and nonunion (nonsignatory) benefits, and certainly not as to the monetary value of the differences, it is clear that the benefits provided by the National Agreement are significantly higher, particularly with respect to retirement and pensions, the benefits most directly involved here. The 40-cent per ton royalty, to which signatories are obligated, pays for such benefits as health and hospitalization, life insurance, funeral benefits, and pensions. (See General Counsel's Exhibit 3R, pp. 18-20.) To be eligible, an employee

must have worked 20 years in the coal industry for signatories or nonsignatories, as long as his last year of employment was with a signatory.[22] UMW retirees are paid a flat sum (currently $150 a month), without regard to length of service. The table below, based on available published data, sets forth in comparative fashion the extent to which certain benefits were provided by operators covered by UMW contracts and those not so covered in November 1962 (generally prevailing in 1962-1963) and in January 1967.[23] As to vacations, the 1967 Industry Wage Survey (p. 1) reveals that the large majority of all employees, signatory and nonsignatory, were provided eight paid holidays a year and two weeks paid vacation. According to the 1962 Industry Wage Survey (p. 10), "Most of the workers not eligible for vacation payments were in mines not having labor-management contract agreements."

While the published data do not give cost breakdown or value of the various benefits, there is some testimony as to cost experience by three nonsignatories. Dixie partner Holcomb testified that he provided hospitalization, medical benefits, and life insurance which, in 1964 and 1967, cost him 5 cents a ton. He also testified that the cost of a $200 per month pension starting at age 60 would be 10 cents per ton, but he did not sub-

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22. The "signatory last employment" provision was recently held by the District of Columbia Circuit not to provide a rational basis for denying benefits to applicants. *Roark v. Boyle,* Case No. 23138, decided August 14, 1970 (74 LRRM 3025).

23. Source: *Industry Wage Surveys, supra,* footnotes 20 and 21.

stantiate this figure by documentary or other credible evidence; Dixie does not provide a retirement plan. Dixie witness Ratliff testified that the company he operated in 1962-1967 provided its 20 employees hospitalization, accident insurance, and life insurance, but he did not indicate their cost. He now operates a company (Landmark Mining) whose collective agreement with the Southern Labor Union calls for 10 cents per ton "royalty" payment for health and medical coverage. At the time of the hearing he was negotiating a "pension and retirement plan which will mean an increase in the welfare royalty payments" to 25 cents a ton, but this agreement "hasn't been consummated yet"; nor did Ratliff describe the extent of coverage and retirement benefits involved.

Table 3—Pension and Other Fringe Benefits

Type of Benefit	Percentage of Employees Covered			
	November 1962		January 1967	
	Sig.	Nonsig.*	Sig.	Nonsig.*
Life Insurance, Death or Funeral	100	29-36	100	47-38
Accidental Health and Dismember. Insurance	—	21-30	—	37-35
Sickness & Accident Insurance	100	14-18	100	16-17
Sick Leave				
Hospitalization Insurance	100	29-48	100	47-58
Surgical Insurance	100	29-48	100	47-54
Medical Insurance	100	21-25	100	47-48
Catastrophe Insurance	100	7-6	100	11-19
Retirement Pension	100	0-9	100	5-12
No Benefit Plans	—	64-43	—	42-40

*First figure under nonsignatory (non-UMW) applies to underground and second figure to surface mines; signatory (UMW) figure covers both types. The data were derived from tables 25 and 44 of General Counsel's Exhibit 4R; and tables 35 and 60 of General Counsel's Exhibit 5R. The nonsignatory percentages of employee coverage were recomputed to a 100 percent nonsignatory base.

Trial Examiner's Supplemental Decision.

The record does contain reliable evidence that Mid-Continent Coal and Coke Co., a nonsignatory producer supplying coal to signatories, maintains a welfare-retirement plan, comparable to the UMW plan, under a collective agreement with a labor organization known as Redstone Workers Association.[24] In 1963-1965, the plan was funded by a royalty payment of 12 to 14 cents a ton; but eligible employees also contributed between 5 and 10 percent of the employer's contribution. In addition to retirement, the plan provides for health and medical benefits and life and accident insurance, as also does the UMW plan. Unlike the latter, however, Mid-Continent employee pension benefits vest after 5 years employment. Several retirees presently draw benefits—one, $140 a month after 10 years of service.

From all of the foregoing, it appears, and I find, that although there are undoubtedly notable exceptions (as in the case of Mid-Continent), the fringe benefits (as well as wages) afforded employees of signatories to the National Agreement were generally higher than those afforded nonsignatory employees. Signatory benefits were far broader in proportion of employees covered as well as benefits extended. However, cost differences of the fringe benefits are not really measurable in monetary terms. Dixie concedes (brief, p. 33) that "if a difference must be determined" the cost of at least one of them, pensions, "which usually was not provided" by nonsignatories, ranged between 10 and 15 cents a ton.

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24. The wage rates provided in that agreement are also comparable to, if not higher than, those provided in the UMW (National) agreement. Additionally, Mid-Continent gives its employees a production bonus which in 1963 ranged between $250 and $350.

Its witness Ratliff indicated that it is at least 15 cents. As to wages, the record does show significant differentials as between the signatory and nonsignatory sectors, measurable in dollars and cents. These differentials were $1.13 and $1.25 an hour for underground and surface mines, respectively, in 1962-1963; and $1.13 and $1.44 an hour, respectively, in 1967. Converted to a per ton basis, Dixie, as hereafter noted (sec. B, 3. b. (iii), contends that the differentials did not exceed 18 cents a ton. However, as hereafter found (*ibid*), the per ton wage differentials could have been as much as 56 cents for underground and 28 cents for surface mines in 1962-1963; and as much as 42 and 24 cents, respectively, in 1967.

b. *Contentions*

(i) Although conceding that "some differential probably exists in wage and working condition standards between signatory and nonsignatory operators," Dixie contends (brief p. 20) that the "precise amount is not ascertainable." At the same time it admits (brief p. 26) that "certain evidence and statistical techniques can be, and have in fact been, employed to obtain an approximation of the wage and fringe benefit differences upon which a judicial determination can be derived," but claims that those differences are much smaller than is "suggested" by the 80-cent clause. Dixie also contends that it is difficult to compare signatory and nonsignatory wages and fringe benefits because, among other things: (1) "contrary to the assumption of both the Board in its remand order and the Court of Appeals, there is no solitary wage figure for UMW members" since each of the 27 UMW districts prescribe their own wage scales (brief pp. 20-21) while the wage rates in most small

mines are "unitary" (brief 21); (2) that even the official published Government reports and statistical studies (such as those previously referred to) show "a variety of wage scales found in [both signatory and nonsignatory] mines with the wage paid very clearly related to the output per man hours" (brief 24); that testimony adduced at the instant and prior hearings demonstrates that the Union had offered some of the smaller independent operators entirely different (lower) wage rates and less costly pension benefits than those provided in the National Agreement (brief pp. 21-22); and that the latter circumstance, together with the alleged claim that many signatories do not, in fact pay the full 40-cent royalty called for in the National Agreement, demonstrate that the contract wages and benefits fail to reflect the true level of contract wages and work standards in signatory mines.

(ii) To begin with, it is indeed difficult to determine the *precise* wage and fringe benefit differentials as between *individual* operators in the bituminous coal industry, signatory and nonsignatory. The multiplicity and variety of establishments, the competitive nature of the industry, and the differences in methods of operation add to this problem.[25] However, the in-

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25. In 1963, the year preceding inclusion of the 80-cent clause, there were over 6,000 establishments with a total of 132,000 employees, of which two-thirds were employed in large mines (employing 50 or more men) and one-third in small mines. (General Counsel's Exhibit 2R, 4A) It is clear that the large mines enjoy significant economic advantages over the small mines due to their mechanization, closeness to coal preparation plants, and railroad loading points. Increasing mechanization since World War II has resulted in the development of small "truck" mines, which haul and

quiry directed by the Board and Court in this case relates to the differentials "generally" in existence between signatory and nonsignatory operators — "a broad equation for the difference [if any] in standards throughout an industry of diverse production units" (*U.M.W. (Dixie), supra*, 399 F. 2d at 980). The Board and Court presumably were of the view that in seeking to equalize wages and work standards, UMW was not obliged to look beyond the general industry picture, knowing well that separate area-by-area and employer-by-employer examination was impracticable and beyond the Union's reasonable capacity.[26] Contrary to

sell their coal to a "ramp" (also known as a "tipple" or preparation plant). The ramp operator cleans and grades the coal and ships it directly to the consumer (e.g., utilities) by railroad car or barge; some also produce their own coal. (See Trial Examiner Reel's decision in 179 NLRB No. 80, p. 6.) According to UMW witness Blizzard, assistant controller of the UMW Welfare and Retirement Fund, many of the ramp operators are signatories.

26. The above-stated considerations constrain me to reject Charging Party Davison's basic objection to the entire approach in this inquiry. According to Davison (brief p. 14) the "validity of the 80-cent clause in Riverton's contract depends upon whether the clause was addressed solely to labor relations of Riverton *vis-a-vis* its own employees." (Riverton, a wholly-owned subsidiary of Davison, buys and sells the coal; Davison acts as its exclusive agent.) This means according to Davison, that in order to establish validity of the clause it must appear that Riverton's nonsignatory suppliers had had wage, fringe, and working condition standards generally lower than those provided in its collective agreement (also the National Agreement) with UMW. Since, according to Davison, the evidence introduced by General Counsel and Dixie "relating to

Dixie's claim, it is therefore not critical to this inquiry that the wage scales in one UMW district vary from those of another district,[27] that the particular pay rates of one operator differ from those of another, or even that the Union had allowed some independent operators to operate at lower than contract wage rates.[28] Furthermore, Dixie's claim that most small mines have "unitary" wage rates is not substantiated even by testi-

working conditions in the mining industry . . . obviously do not establish the wage rates paid by Riverton's suppliers" (brief p. 25), it concludes that the validity of the 80-cent clause has not been established. Davison itself offered no data on these matters. Riverton President Louis A. Davison, who testified in this hearing, stated that he had "no idea" of the wage scales and welfare benefits at the mines operated on his lands from which (among others) Riverton purchases coal.

27. The record shows that basic rates (uniform annual increases ranging from $1 to $3 a day, added to previously established contract rates) are in the first instance negotiated at the national level. District representatives and local coal operators in the various UMW districts then get together and publish in bulletins the specific dollar-and-cent rates for particular job classifications reflecting the uniform nation-wide wage increases. Wage rates for new classifications (as for operations with new machinery) are worked out jointly by District representatives and local operators, subject to ultimate approval at the national level.

28. As hereafter shown (sec. B. 3. b. (iv)), this claim is based on testimony of Dixie witnesses Holcomb and Ratliff that a UMW District official (Hibbits) had offered them "side agreements" (a "sweetheart" arrangement) under which they would be permitted to pay substantially lower welfare royalities, as well as wages, even though they signed the National Agreement. Dixie's contention is not supported by credited evidence.

mony it relies on. Dixie partner Holcomb only testified that "our *average* wages in 1964 were about $16 a day," implying that there was a variable range.[29] He further testified that current (1970) wages "would average from $30 to $50 per day" (tr. 294), a generalized statement he did not support by records; it is not given any weight.

(iii) Dixie contends (brief pp. 28, 40, 52) that in any event the hourly wage differentials shown in the Industry Wage Surveys (General Counsel's Exhibits 4R and 5R, *supra*) when converted into tonnage rates for comparison with the 40-cent per ton welfare royalty (the portion of the 80-cent payment designed to compensate for lower nonsignatory wages) do not exceed 18 cents a ton. It accordingly claims that the 40-cent figure, intended to offset differences in wages between signatory and nonsignatory coal, is punitive rather than compensatory. Dixie relies on an analysis (Dixie Exhibit 7R) prepared by an economist (Dixie witness Abraham) purportedly showing that large mines (employing 50 or more employees, which he equates with union or signatory mines) in 1963 paid an average of $1.27 per ton in wages while small mines (employing less than 50 employees, which he equates with nonunion or nonsignatory mines) paid $1.09 per ton — a difference of only 18 cents. The key data in Abraham's compuation are shown in the following table:

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29. Holcomb testified that Dixie "contracts" its labor to "foremen" who operate its lands, with Dixie furnishing all equipment and bearing all costs, except labor (e.g., engineering, repair, insurance, workmen's compensation); the foremen "usually . . . split equally" with the men the labor fee received from Dixie "because" the men are members of the foremen's families.

Table 4 — Dixie Exh. 7 Wage Costs Differential Calculation (1963)

Item No. Dixie Exhibit 7R	Items	Small Mine (Nonunion) 0-49 employees	Large mine (Union) 50 or more employees
8	Value of shipments and receipts ($000)*	$650,460	$1,707,876
**	Price of coal per ton	$4.48	$4.48
17	Est. tons shipped & rec'd (000)	145,192	381,222
4	Total wages of workers (000)	$158,352	$483,986
18	Wage cost per ton (4-17)	$1.09	$1.27
	Amount of differential ($1.27-$1.09)		.18

*This term is defined in General Counsel's Exhibit 2R, pp. 61-62. From the manner of its use by witness Abraham, it is apparently the dollar value of all coal produced in 1963. Thus, he computed his estimate of the number of tons "shipped and received" (Line 17) by dividing the "value of shipments and receipts" by the price of coal.

**See footnote 2 of Dixie Exhibit 7R.

Abraham's analysis appears to be defective in at least one crucial respect. He assigns a *single* $4.48 average selling price for the small (union or signatory) producer and the large (nonunion or nonsignatory) producer. However, the assumption that both types of producers obtained identical prices for their output is contrary to record testimony. Dixie's own witness Holcomb (a nonsignatory) testified that "it was a well known fact that they [purchasing agents] paid more money for union coal than they did nonunion coal"; according to Holcomb, Dixie's average 1964 market price was $4.10 a ton. (See Dixie Exhibit 10 and original hearing transcript p. 660.) Dixie witness Ratliff (also a nonsignatory) testified that there was a difference in prices obtained by truck operators (small operators, see *supra*, fn. 25) and large operators (see original hearing transcript p. 339); according to Ratliff, his average selling price between January and April 1964 was $3.35 (original hearing transcript p. 332). The $4.48 average price used by Abraham in his calculations appears to be more representative of prices received by large producers who, according to Abraham's own figures (Dixie Exhibit 7R), account for almost two-thirds of coal shipments. Substituting, as the price of coal received by small mines, Holcomb's (Dixie) $4.10 and Ratliff's $3.35 per ton average selling price for the $4.48 figure used by Abraham would result in average per ton differentials of 27 and 45 cents rather than the 18 cents computed by Abraham — i.e., assuming validity of his method of calculations.

Another inaccuracy in the approach adopted by Abraham is his equating "small" mines with nonunion

mines. The Industry Wage Survey of 1967 (General Counsel's Exhibit 5R, p. 3) shows that 33 percent of the "small" underground mines (less than 50 employees) and a little more than 25 percent of the "small" surface mines were in fact operating under collective-bargaining agreements at that time. While there is no similar published data for the 1963-64 period, it is reasonable to assume that a proportion of these "small" mines were also unionized at that time.

A more reliable method of determining the average per ton wage differentials as between signatory and nonsignatory mines would appear to be the more simple procedure of dividing the average per man day wage by the average per man day output, separately for union (signatory) and nonunion (nonsignatory) mines, using the official published November 1962 and January 1967 Industry Wage Surveys (*supra*, General Counsel's Exhibits 4R and 5R). The following table, showing these calculations, demonstrates that the average per ton wage differentials between signatory and nonsignatory mines in November 1962 (and it is fair to assume 1962-1963) were 56 cents for underground mines (the dominant segment of the coal industry) and 28 cents for surface mines; and that the comparable differentials in January 1967 were 42 and 24 cents, respectively.[30]

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30. None of the parties adduced any documentary evidence from which more recent wage differentials (and also fringe benefit differentials) may be calculated. As previously indicated, the evidence as to post-1967 wages and fringe benefits is confined to general and uncorroborated testimony, which I consider too unreliable for predicating findings thereon.

Table 5 — Conversion of Earnings Per Day to Earnings Per Ton, 1962 and 1967

	1962 (NOV.)			1967 (JAN.)		
	SIG.	NON-SIG.	DIFF.	SIG.	NON-SIG.	DIFF.
UNDERGROUND MINES*						
(1) Wage Per Man-Day	$22.55	$15.84		$25.52	$19.12	
(2) Tons Prod. Per Man-Day**	11.97	11.97		15.07	15.07	
Wage Per Ton (1-2)	1.88	1.32	.56	1.69	1.27	.42
SURFACE MINES*						
(1) Wage Per Man-Day	24.43	16.96		27.55	18.88	
(2) Tons Prod. Per Man-Day**	26.76	26.76		35.17	35.17	
Wage Per Ton (1-2)	.91	.63	.28	.78	.54	.24

* Signatory hourly earnings (General Counsel's Exhibit 4R and 5R) converted to wages per day by multiplying those earnings by 7½ hours. Nonsignatory multiplier was 8 hours; hourly earnings from same source.

** Average production data from Dixie Exhibit 1R, p. 77.

NOTE: As previously noted (fn. 21), in November 1962, underground mines employed 85 percent of the workers included in the Industry Wage Survey; slightly over 80 percent were covered by the 1967 survey.

(iv) Relying on the testimony of its witnesses Holcomb (a Dixie partner) and Ratliff, both nonsignatories operating in Pike County, Kentucky, Dixie contends that some signatory operators are paying less than the wages and 40 cents a ton royalty required by the National Agreement. (Dixie brief pp. 30-31, 21-22) Dixie thereby apparently seeks to show that the levels of signatory wages and benefits were not the true levels for purposes of comparison with nonsignatory levels. According to Holcomb and Ratliff, a UMW District president (Hibbitts) in 1959 and 1963 in effect offered them "sweetheart" agreements, suggesting creation of a "sham" organization, whereby they could pay less wages to employees and royalty to the UMW Welfare Fund, if they signed the National Agreement. Holcomb testified that Hibbitts in 1959 offered to sign a "side agreement" that would require him to pay a 15-cent royalty. Ratliff testified that in addition to the reduced (15-cent) royalty Hibbitts told him he would have to pay only $15 per day wages. According to Ratliff, Hibbitts again approached him in 1963, this time urging that he and other operators in Pike County form a sham organization of the type then operating in nearby Floyd County (Coal Associates, Inc.), which would sign the National Agreement, but its members would pay only the reduced royalty.

Hibbitts denied the "sweethearting" offers attributed to him. He testified that he met with the Pike County operators (including Ratliff and Holcomb) in 1959, but only to urge them to sign the 1958 National Agreement; claiming they were truck operators unable to compete with larger rail operators, they wanted to

sign separate and more favorable agreements;[31] and that he (Hibbitts) agreed only to give the operators a letter to the effect that as signatories they would be held responsible solely for royalty payments on coal they actually mined, as distinguished from coal shipped, for handling to their ramps or tipples. As to the 1963 encounter, Hibbitts admitted discussing the Coal Associates organization, but indicated that it was Ratliff who wanted to know how that organization operated and the kind of agreement it had with UMW. Hibbitts testified that Coal Associates was formed as a result of a meeting called by the Kentucky Commissioner of Labor and the truck operators to take steps to avoid repetition of a strike triggered by the Welfare Fund's cancellation of hospital benefits to employees of truck operators for nonpayment of royalty funds; that the Association was organized to insure that these small operators made full royalty payments; and that members of the Association either signed the National Agreement separately or gave the Association authority to sign for them — the usual procedure where associations are involved.

I credit Hibbitts' testimony in preference to Holcomb's and Ratliff's for the following reasons: Hibbitts impressed me as a candid and forthright witness; his testimony is in part corroborated by that of Blizzard, an official of the Fund, and by records of the Fund, showing royalty collections and payments by Coal Associates on behalf of member-operators; Hibbitts, as District president, had no authority to negotiate a col-

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31. Ratliff corroborated Hibbitts on this point; he conceded seeking a "more favorable" contract.

lective-bargaining agreement other than the National Agreement;[32] and Dixie called no officials or members of Coal Associates to contradict Hibbitts' testimony concerning the origin, purpose, and operation of that association.

Accordingly, I find that the record does not support Dixie's contention that UMW had engaged in the practice of "sweethearting," whereby UMW would verbally authorize signatory operators to pay less than the contract royalty or wages. In this connection, it is significant that Dixie did not attempt to adduce evidence more recent than the alleged 7-and 11-year old episodes relied on.

(v.) Finally, Dixie adduced considerable evidence purporting to show that many signatories did not pay the full 40-cent welfare royalty based on the tonnage production reported by those signatories to state agencies. According to Dixie (brief p. 30), a random study of 20 percent of the operators signing the 1964 National Agreement (348 or 20 percent of the 1,800 signatories) showed that about 22 percent of the signatories paid substantially (25 percent or more) less royalties than required of them (Dixie Exhibits 30R and 31R). However, the testimony of Blizzard, assistant comptroller of the UMW Welfare Fund, a forthright and credible wit-

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32. See also Trial Examiner Reel's decision, 179 NLRB No. 80, p. 7; and Trial Examiner Hunt's decision, 165 NLRB at p. 474. (One or both incidents were raised in the two prior proceedings.) Although attributing to Hibbitts an offer to enter into an agreement different from the National Agreement, Ratliff at this hearing conceded he was under the "assumption" that Hibbitts had no authority to make such offer.

ness, establishes that discrepancies between tonnage reports to state agencies and to the Welfare Fund are accountable by a variety of reasons — including: (1) the state reports are compiled on a calendar year basis while the Fund's reports to the U. S. Department of Labor (Dixie's source for comparing state tonnage reports) are made on a fiscal year basis; (2) large signatories frequently make lump sum royalty payments in their own names on behalf of small signatories (such as truck mines producing on their lands) and the latter often duplicate tonnage reports to the states; (3) some tonnage reports to the state are based on raw tonnage production while payments to the Fund are made on "clean" coal; (4) state tonnage reports normally cover all of an operator's production while reports to the Fund exclude the operator's mines not covered by the UMW contract; (5) some operators are simply in arrears or delinquent and have executed notes to make up delinquencies, or, if contesting the payments, are litigating liability; (6) some operators reporting tonnage to states have failed to report production to the Fund because they ceased to be signatories during the reporting year; and, finally (7), payments to the Fund sometimes even exceed amounts due on the basis of state tonnage reports because the payments cover prior unreported production or past delinquency.

In any event, even assuming, *arguendo*, the accuracy of the state tonnage reports, Dixie now only claims (brief p. 30, fn. 38) that 13 of the 348 companies sampled were "seriously delinquent" in payments to the UMW Welfare Fund in 1964-1967. According to Dixie, the total amount of their delinquency during this 4-year

period was $296,559 (Dixie Exhibit 30R), but the record establishes (hearing transcript p. 1009) that in this same period the Fund collected $86,309,620 from the 348 companies. The claimed delinquency, therefore constitutes only .3 percent of the total obligation ($86,606,-179) to the Fund — hardly sufficient to establish an appreciable departure from the 40-cent payment requirement.

Accordingly, I reject Dixie's contention with respect to the alleged underpayments to the UMW Welfare Fund, as well as its other contentions directed to the claim that the signatory wage rates and fringe benefits did not reflect the true level of rates, benefits, and standards prevailing in signatory mines. For reasons stated, I also reject its contention that the differentials respecting these matters (as between signatory and nonsignatory mines) were slight and insignificant.

4. THE REASONABLE RELATIONSHIP BETWEEN THE WAGE, FRINGE AND WORKING CONDITION STANDARDS AND THE 80-CENT CLAUSE

(a) As already found (*supra*, sec. B. 3. a.), the average hourly wage differentials between signatory and nonsignatory operators ranged from $1.13 to $1.25 in 1962-1963 and from $1.13 to $1.44 in 1967, depending on whether underground or surface mines were involved. If converted into cost per ton, the 1962-1963 differentials were 56 cents for the predominant underground type mines (employing over 80 percent of the industry workforce) and 28 cents for the surface mines; in 1967, the per ton cost differentials were 42 and 24 cents respectively. As also found, the fringe benefit dif-

ferentials between signatories and nonsignatories, although substantial, are not measurable in monetary terms, let alone in cents per ton, although it appears that the superior pension benefits provided by signatories cost at least 15 cents a ton. To these must be added the differentials for special benefits such as premium pay for items like overtime and late shifts provided in signatory contracts, which, too, however, cannot be evaluated in monetary terms. All factors considered, I am convinced that the 80-cent clause does substantially equalize, and therefore bears a reasonable relation to, the differentials in labor costs (wage, fringe and work standards) as between signatory and nonsignatory operators. I so find.

(b) Dixie contends (brief p. 35) that "although on an industry-average basis one might argue that there is some relationship between the 80-cent and wage and benefit difference[s]," those differences are not meaningful because they fail to take into account differences in productivity rates as between signatory and nonsignatory producers, equating the two with large and small producers (brief p. 40). According to Dixie, "The higher the output per man hour achieved by a company, the greater is the per hour cost of the 80-cent penalty" (brief p. 35). Dixie would argue (brief p. 45) that to the extent nonsignatory productivity was less than that of the signatory, the labor cost differential is reduced.

(c) To begin with, I find merit in UMW's position (brief p. 24) that insofar as here relevant, the remand in this case calls for a determination only (1) of the

differentials in wage and fringe benefits received by employees of nonsignatories and *"those established under the National Bituminous Coal Wage Agreement"*; and (2) whether the 80-cent clause *"bears a reasonable relationship" to those differentials.* It is common knowledge that one of the main goals of labor organizations is to attempt to enhance the wages and work standards of employees in the units they represent. In seeking to achieve this objective it is not improper for a labor organization to strive for industry-wide uniformity in work standards, so long as this does not, "by intent or effect, compel the unorganized segment of the industry to sign" the union's collective agreement. *Galligan, supra,* 179 NLRB No. 80. In negotiating its bargaining contract with an employer or group of employers it is too much to expect the union to go through the kind of intricate economic analysis that Dixie, for example, went through in this case *(infra)* to determine the varying productivity and efficiency figures of the numerous mines in the industry.[33] Nor, as UMW Secretary-Treasurer Owens testified, did it occur to UMW to do so here in seeking to achieve its long-standing objective to obtain uniform industry-wide wages and work standards through the 80-cent royalty clause. As I construe the remand, if the Union sought only to equalize the wage and fringe differentials between the signatories in the bargaining unit with those of nonsignatories outside it, the Union's *intent* was primary and lawful

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33. It is to be noted that Dixie's economic analysis was based on data appearing in General Counsel's Exhibit 2R, a publication of the U. S. Department of Commerce which was issued in October 1966, almost 3 years *after* the 80-cent clause was executed.

(d.) In any event, this record does not permit an accurate evaluation of the true comparative productivity of signatories and nonsignatories. To be sure, there is testimony to the effect that large mines enjoy significant economic advantages over small mines because of mechanization and closeness to coal preparation and railroad loading points. While these factors tend to show that there are differences in efficiency and productivity, the extent of these differences is not satisfactorily established. In this connection it should be noted that a substantial number of "small" mines (which Dixie characterizes as relatively inefficient "nonunion" mines) are, in fact, signatories to the National Agreement and presumably can and do pay the wages and fringe benefits prescribed in it. As already noted (*supra*, sec. B. 3. (b.) (ii)), about one-third of the employees in small underground mines and one-fourth in small surface mines are employed by signatories; and many of the small mines regularly contribute the required 40-cent royalty to the UMW Welfare Fund either in their own names or in the names of larger signatory purchasers. (*supra*, sec. B. 3. b. (v))

Dixie relies on an analysis of its expert witness, economist Abraham, to show that there was a 22.6 percent greater productivity in larger mines (characterized as "union" or "signatory" mines employing 50 or more employees) than in the smaller ("nonunion" mines employing less than 50 employees). But the vice in Abraham's productivity computation is, as was also previously shown in connection with our discussion on conversions of hourly wage rate differentials to tonnage rate differentials (sec. B. 3. b. (iii)), that he errone-

ously assigns a *single* $4.48 selling price for both small and large producers. The key element in Abraham's productivity and conversion computations is the price of coal. As shown, Dixie and Ratliff, "small" (nonsignatory) operators, sold their coal at $4.10 and $3.35 a ton, respectively. Employing Abraham's method of calculation, it appears, as the table below shows, that large mine productivity was only 12.2 percent greater than small mine productivity if Dixie's $4.10 price is substituted for Abraham's $4.48 figure; and that large mine productivity was less (9.75 percent) than small mine productivity if the $3.35 Ratliff price is substituted.

Table 6: Productivity in Accordance With Method of Dixie Exh. 7R but With Varying Price Assumptions

	I. ABRAHAM DIXIE EXHIBIT 7R BASIS		II. DIXIE COAL PRICE ASSUMPTION		III. RATLIFF COAL PRICE ASSUMPTION	
	Small Producer	**Large Producer**	**Small Producer**	**Large Producer**	**Small Producer**	**Large Producer**
1. Man-hours of Workers (000)	68.265	146.156	68.265	146.156	68.265	146.156
2. Value of Shipments & Receipts (000)	$650,460	$1,707,876	$650,460	$1,707,876	$650,460	$1,707,876
3. Price of Coal Per Ton	$4.48	$4.48	$4.10	$4.48	$3.35	$4.48
4. Est. Tons Shipped & Received (000)	145,192	381,222	158,649	381,222	194,167	381,222
5. Productivity; Est. Tons Shipped Per Man-Hour	2.127	2.608	2.324	2.608	2.844	2.608
6. Productivity Per Man-Day (8.1 hours)	17.228	21.125	18.824	21.125	23.036	21.125
7. Percent Productivity Greater in Large Than Small Mines	22.6%		12.2%		(9.75%)	

NOTES: (1) Data in Lines 1 & 2 derived from Dixie Exh. 7R
(2) Data in Col. I derived from Dixie Exh. 7R
(3) Line 4 is computed; Line 2 ÷ Line 3
(4) Line 5 is computed; Line 4 ÷ Line 1
(5) Line 6 is computed; Lines 5 X 8.1 Hours
(6) Line 7 is computed; (Productivity Per Man-Day, Large Producer Minus Ditto Small Producer) ÷ lowest of the two figures.

It should be emphasized that the Dixie and Ratliff prices are used in table 6 only to demonstrate the error in Abraham's 22.6 productivity differential. They do not necessarily reflect the prices received by small producers generally in the industry; the record is silent as to specific average industry coal price obtained by small producers.

Accordingly, I conclude that Dixie's contention that there was a 22.6 percent productivity differential between large (signatory) and small (nonsignatory) producers is unsupported by credible and reliable evidence. For reasons already stated, I find and conclude that the 80-cent clause bears a reasonable relation to the differential in per ton labor cost as between these two sectors of the industry.

C. Conclusions

1. Introduction

As to the questions propounded by the Board's remand order I have found (1) that the intent of the parties in adopting the 80-cent clause was to equalize the differences in wages and fringe benefits *generally* existing between signatory and nonsignatory mines in order to protect the work opportunities and standards provided UMW members employed by signatory operators; (2) that the wage, fringe and working condition standards of employees in nonsignatory mines are *generally* lower than those established under the National Bituminous Coal Wage Agreement; and (3) that the 80-cent payment to which signatories are obligated on nonsignatory coal purchases bears a reasonable re-

lationship to the wage and fringe benefit differentials between employees of signatory and nonsignatory operators. However, as previously indicated (*supra*, sec. B. 1), these findings are not dispositive of the ultimate issue of whether the 80-cent clause is a valid work-preservation and union-standards clause and not an invalid union-signatory clause. As noted, the record developed in the reopened hearing in the main relates to only one of the Board's findings in the original hearing — the finding that there was no record evidence that "the Union's initial proposal, or contract figure of 80 cents, or any other figure would be reasonable compensation" for differences between signatory and nonsignatory wages and benefits to support UMW's contention that the clause was "intended to protect employees' job opportunities" (165 NLRB at 476-477). Having now found that "reasonable compensation" did exist, it must still be determined (in accordance with the Board's direction that findings and conclusions be made in the light of the prior record and applicable law) whether the 80-cent clause fails to meet the test of validity on other grounds, including those previously adverted to in the Board's prior decision, but which the Court of Appeals did not reach. It is apparent from the Court's opinion that if it appeared that the 80-cent payment provision did not represent "a broad equation for the difference in standards," the clause could not qualify as "a surrogate union standards clause" (399 F. 2d at 980-981);[34]

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34. The Court stressed that, "Conceivably the parties could have agreed on a money figure which in their judgment represents a broad equation for the difference in standards" and took note of dissenting Member

it was accordingly unnecessary for the Court to pass on the grounds previously relied on by the Board to invalidate the clause before deciding whether the 80-cent clause was a reasonable equalizer, the major issue posed by the remand.

In reaching my conclusions, I deem myself bound by the Board's findings of fact in the earlier proceeding, except to the extent they may require qualification or modification in light of the additional evidence adduced in the remand hearing. I also deem myself bound by the legal guidelines and principles enunciated by the Board in its earlier decision, since, insofar as appears, the Court of Appeals disturbed none.

2. Qualification of the 80-cent clause as a work-protection and union-standards provision

In *National Woodwork Manufacturers Assn. v. N.L.R.B.*, 386 U.S. 612, 645, the Supreme Court stated that in determining whether a contractual clause has a lawful primary work-protection objective "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." In *Meat & Highway Drivers, Local 710 (Wilson & Co.) v. N.L.R.B.*, 335 F. 2d 709, 713 (C.A.D.C.), the Court stated "[r]esolution of the difficult issue of primary *versus* secondary activity . . . involves consideration of two factors: (1)

Jenkins' view that "it would appear that, in the absence of additional evidence, the clause should be regarded as no less than an effort to protect work standards by equalizing the labor costs between employees of signatories and nonsignatories." (399 F.2d at 980.)

jobs fairly claimable by the bargaining unit, and (2) preservation of those jobs for the bargaining unit. If the jobs are fairly claimable by the unit, they may . . . be protected by provision for, and implementation of, no-subcontracting or union standards clauses in the bargaining agreements." On the other hand, if the jobs are not "fairly claimable by the bargaining unit," the contractual provision is unlawful since it is deemed to be "tactically calculated to satisfy objectives elsewhere." *National Woodwork, supra*, 386 U.S. at 644. See also *District No. 9, I.A.M. (Greater St. Louis Automotive Trimmers, etc.) v. N.L.R.B.*, 315 F. 2d 33, 36 (C.A.D.C.); *Orange Belt District Council of Painters (Calhoun Drywall Co.) v. N.L.R.B.*, 328 F. 2d 534, 538 (C.A.D.C.). Of paramount consideration, therefore, is the scope of the bargaining unit and whether the contractual provision was designed to benefit only employees in the primary unit. See *Lewis (Galligan), supra*, 350 F. 2d at 802.

It is clear that the key factor in the Board's previous (June 1967) determination that the 80-cent clause was an unlawful secondary provision is its finding that the bargaining units here consist of various multiemployer groups (BCOA, Southern Coal Producers Association, etc.) and individual operators (Riverton, etc.) with which UMW executed separate collective agreements. As the Board stated (165 NLRB at 468, fn. 8), "It is . . . apparent that our holding that the 80-cent clause is unlawful is founded specifically upon the finding that there exists in the bituminous coal industry a multiplicity of collective-bargaining units." The Board specifically rejected the contention that a single

industry-wide unit, encompassing all employees of all signatories to the National Agreement, was appropriate (165 NLRB at 467, 468, 475) — a finding not disturbed by the Court of Appeals and not reopened on remand.[35] The critical inquiry, then, is whether the 80-cent clause was intended to "function" and "functions" (*U.M.W. (Dixie), supra*, 399 F. 2d at 980) as a work-protection and union-standards clause to protect groups broader than the established bargaining units. If the clause was designed to operate, or operates, "to aid union [UMW] members generally, rather than members of the unit," it is an unlawful secondary clause. *Meat & Highway Drivers (Wilson & Co.), supra*, 335 F. 2d at 716.

Specifically, the Board found that the 80-cent clause was not a lawful work-protection clause because it was not intended to preserve, and did not operate to preserve, the work opportunities of the employees in particular units. Thus, the Board pointed out that a signatory was free under the collective agreement (i.e., he is not required to make the 80-cent payment) to fulfill his requirements for coal by purchasing from other signatories, including those outside his bargaining unit, thereby prejudicing rather than enhancing the work opportunities of his unit employees (165 NLRB at 468, 477). It also found that the 80-cent clause, by its express terms, applies to all coal purchases including "supplemental" coal (i.e., coal qualitatively or quantitatively

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35. Addressing itself to the contention that "the contract is coextensive with the work unit, because the same contract, although negotiated with different bargaining units, covers the entire industry," the Court said, "[w]e need not reach the question of unit size at this time." *U.M.W. (Dixie), supra*, 399 F. 2d at 980.

beyond the signatory purchaser's capacity to produce) which is not "fairly claimable" by the unit; thus, for example, it was found that Riverton, an individual signatory whose employees comprise a separate unit, was required to make the 80-cent payment on coal purchases needed to fulfill contractual commitments even though employees in the Riverton unit could not possibly produce the coal since Riverton had operated to the limit of its capacity. (165 NLRB at 477.)

As to the contention that the 80-cent clause was a valid wage-standards or union-standards provision, the Board held that it "does not qualify as [such] because a penalty is imposed whenever unit work is subcontracted to nonsignatory operators without regard to the wage standards of such employers." (165 NLRB at 468).[36]

Finally, the Board held that the 80-cent provision was "really aimed at nonsignatory sellers," finding that the "clause has caused some nonsignatory operators to sign the UMW agreement in order to continue selling their coal to signatories, and caused some signatory operators to cease purchasing coal from nonsignatories in order to avoid the 80-cent penalty which would be imposed under the contract if they continued to make such purchases." (165 NLRB at 467, 477). Thus, the

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36. It is this feature that readily distinguishes PWC, now ruled valid by the Board (see *Galligan*, 179 NLRB No. 80, *supra*, sec. A. 2). PWC only requires that all coal procured by a signatory "be mined or produced under terms and conditions which are as favorable to the employees as those provided for" in the National Agreement; no monetary penalty or other restrictions are placed on coal produced under terms equal to, or better than, those of the purchasing operator.

Board found (*id.* at 473-474): (1) that Riverton, an individual signatory which had been purchasing nonsignatory coal before the 80-cent clause went into effect, ceased such purchases thereafter because it could not afford to make the 80-cent payment, and that Riverton cancelled all leases with nonsignatory suppliers (to whom it had leased its mining properties), negotiating new leases only with operators who became signatories; (2) that Davison Fuel and Dock Company, Riverton's parent company and as such bound by the National Agreement as an "affiliate" of a signatory, ceased purchasing coal from a nonsignatory (Ford Coal Company), settling the latter's breach of contract claim for $15,000; (3) that Dixie, a nonsignatory, which had sold 40 percent of its coal to signatories prior to the advent of the 80-cent clause, since ceased selling coal to signatories, one such purchaser (Republic Coal & Coke Co.) cancelling its contract with Dixie because it claimed its profit margin was insufficient to absorb any part of the 80-cent payment; (4) that United Colliers, Inc., a nonsignatory, was informed by its only signatory purchaser that the latter would no longer purchase nonsignatory coal "because of the 80-cent provision"; (5) that 13 of the 15 members of Harlan County Coal Operators Association, who refused to sign the 1964 agreement because they could not meet the 80-cent payment, continues to sell only about half their coal to signatories; and (6) that Union official Hibbitts, in his 1959 and 1963 attempts to persuade Dixie partner Holcomb and coal operator Ratliff to sign the National Agreement (see *supra*, sec. B. 3. b. (iv)), admitted telling the two operators that he was "well aware" of the small mines' financial inability to comply with the 80-cent payment, but

that he (Hibbitts) states that he could not negotiate any agreement other than the National.

The evidence adduced in the remand proceeding does not detract from the findings and conclusions of the Board in the earlier proceeding, premised upon the Board's undisturbed determination that the various bargaining units (and not a single industry-wide unit) are the sole units for which the Union may seek to preserve work opportunities and standards. The record developed in the instant hearing was devoted to an inquiry on the wage and fringe benefit differentials between signatory and nonsignatory mines and also the intent of the parties in adopting the 80-cent clause, rather than to the secondary impact of the clause. Nonetheless, some of the evidence adduced tends to fortify the conclusions previously reached in this case. Thus, it was demonstrated that if the 80-cent clause were applied to signatories who have been purchasing a unique type of coal ("supplemental" coal) produced by Mid-Continent Coal & Coke Co. (a nonsignatory whose employees are affiliated with an independent union), those signatory purchasers would be subject to 80-cent payments even though their employees did not, and could not, produce that special coal. Furthermore, it was established that Mid-Continent's wages and fringe benefits, including its pension plan (*supra*, sec. B. 3. a (ii)) were at least comparable, if not superior, to those provided in the National Agreement. Under the circumstances, it is clear, and I find, that the Mid-Continent production was not "fairly claimable" by the signatory bargaining units; nor could the 80-cent provision serve to enhance union standards as against Mid-Continent. Additionally, UMW

Secretary-Treasurer Owens' testimony in the reopened hearing establishes that the intent of the 80-cent clause was to aid UMW members generally (i.e., employees of all signatories to the National Agreement) rather than members of a particular bargaining unit. As already found (*supra*, sec. B. 1), his testimony makes it clear that in embarking upon the negotiations leading to the 80-cent clause, the Union was intent on protecting and preserving uniform industry-wide wages and standards, in line with UMW's historic objective to secure uniform wages and standards among all operators. According to Owens, the integrity of the Welfare Fund, administered on a nationwide basis, was another primary objective.

Based on the guidelines and principles set forth in the Board's earlier decision, which were left intact by the Court of Appeals, I conclude that the 80-cent clause was neither intended to function, nor functioned, to protect work "fairly claimable" by a particular bargaining unit. Accordingly, under established Board law the clause was not "germane to the economic integrity of the principal work unit" (*Orange Belt District Council (Calhoun Drywall Co.) v. N.L.R.B.*, 328 F. 2d 534, 538 (C.A.D.C.)) and must be regarded as an unlawful secondary clause within the intendment of Section 8(e) of the Act. I so find.

3. Respondents' contention regarding the appropriate unit governing application of Section 8(e) of the Act

As pointed out in the Board's earlier decision in this case (165 NLRB at 475-476), both UMW and BCOA

challenged the Board's determination, first made in August 1963 (*Galligan, supra*, 148 NLRB 249, 253-255), that the units for which the Union could lawfully seek work protection are those appropriate for collective bargaining as established under Section 9 of the Act. In the cited *Galligan* case, the Board rejected the contention that the 80-cent clause was "lawful because its purpose is to preserve and protect the work of employees in the industrywide contract unit." (148 NLRB at 253). Noting that UMW negotiates separately with various signatory operators and multiemployer associations, it concluded that "the UMW national contract covers a multiplicity of bargaining units rather than a single industrywide unit," and that "under the normal tests applied by the Board in making bargaining-unit determinations . . . an industrywide unit has not been established by the parties." (*id* at 254). The Board reaffirmed its determination in its June 1967 decision in the instant proceeding, where it also rejected a Union contention (reflected in Member Jenkins' dissenting view in *Galligan* and reiterated in this case) that at the very least "there exists a single industrywide bargaining unit for welfare fund purposes." (165 NLRB at 476). This view is bottomed on the claim that the employees of all signatories share in the Fund's benefits and that they have a common and primary interest in assuring that royalty payments are made on all coal obtained or used by signatories. A majority of the Board rejected this view, adhering to its previous conclusion that "the units which control the determination of the primary or secondary nature of subcontracting clauses are those units found by the Board under its customary standards to be appropriate for collective-bargaining purposes." (165

NLRB at 468). The Court of Appeals took note of Member Jenkins' views, but, as previously noted, stated that it "need not reach the question of unit size at this time." (399 F. 2d at 980).

While the lawfulness of subcontracting restrictions under Section 8(e) should, and does, ordinarily turn on appropriate bargaining unit issues under Section 9 of the Act, equating work and bargaining units for all 8(e) purposes could in some circumstances be viewed as unrealistic. The record in this case, particularly as developed in the remand hearing, demonstrates that the separate agreements executed by UMW with associations (like BCOA) and independent operators (like Riverton), engaged in the commercial field, contain uniform terms and conditions of employment. Trial Examiner Hunt had noted in his decision (165 NLRB at 470) that the contract negotiations in the bituminous coal industry have followed the same pattern for at least two decades: UMW first negotiates the "National Bituminous Coal Wage Agreement" with BCOA, then presents the terms of that agreement to other associations, and later "seek[s] the signatures of as many operators as possible to that contract and no other *written* agreement." Trial Examiner Hunt had found that "there are [in this industry] numerous bargaining units . . . some so small as to consist of few employees." (165 NLRB at 475). It is now apparent that the Union seeks and obtains what is in effect a uniform nationwide agreement, although signed separately unit by unit. It is now also apparent from the history of the 1964 negotiations, as detailed by Union Official Owens, that in pressing for its 80-cent clause, the Union, as well as BCOA, looked

beyond the immediate BCOA bargaining unit. Both Union and BCOA were very much mindful of the economic facts facing the industry, including diminution of employment in signatory mines, the practice of signatory subcontracting to nonunion mines, the desirability of equalizing labor costs as between signatories and nonsignatories, and the need to protect the integrity of the Welfare Fund. It may thus now, upon the supplemental record, reasonably be argued that the Union in its meetings with BCOA was bargaining for terms and work conditions (including the welfare standard and payment) to be applicable to all signatories (BCOA and those who would later sign uniform contracts). As we have seen, the 80-cent clause was designed to protect the standards thus negotiated against threat of loss and undermining by signatories purchasing nonsignatory coal. As it turned out, the 80-cent payment upon which the parties compromised bears a reasonable relationship to the wage and fringe differentials that existed between the signatory and nonsignatory sectors. (*supra*, sec. B. 3 and 4). And it is noteworthy that in its remand order the Board itself expressly directed that the differentials be ascertained on an industry-wide rather than unit-by-unit basis.

Despite the above-stated considerations, it would appear that no choice is left to the Trial Examiner but to find that Respondent UMW and BCOA, by entering into the agreement containing the 80-cent clause, have engaged in unfair labor practices, in violation of Section 8(e) of the Act, based upon the Board's existing determination (binding upon me) that the primary units governing application of Section 8(e) are the *bar-*

gaining units established under Section 9 of the Act.[37] In other words, under existing Board law the work unit for which UMW could seek job and standard protection cannot be a unit wider than an appropriate bargaining unit. Since the 80-cent clause was intended to preserve, and operates to preserve, work opportunities and standards beyond such bargaining units (i.e., on an industry-wide basis), it is an unlawful secondary agreement, violative of Section 8(e) of the Act.

This is not to say that the Union is devoid of means lawfully to realize its objective of uniform industry-wide union standards and to preserve work opportunities for its members. Since the Board has now held PWC lawful, the Union may now flatly bar signatory subcontracting to (or purchasing from) nonsignatories whose coal has not been "mined or produced under terms and conditions which are as favorable to the employees as those provided for in this [National] contract." (*supra*, fn. 36). With PWC in operation, economic hardship and adverse secondary effects on innocent nonsignatory neutrals like Mid-Continent in this case, which maintains equivalent union standards, will be minimized if not eliminated. Furthermore, retention of a monetary equalizer, such as the 80 cents provided by the 1964 agreement, may require periodic reexamination as to validity. Thus, the 80-cent figure, while a reasonable compensation for wage and fringe benefit differentials between signatory and nonsignatory mines in 1963 and 1967, may not be so continually.

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37. The board very recently reaffirmed this principle in the related *Galligan* case involving PWC. (179 NLRB No. 80), presently on review before the Court of Appeals (*supra*, fn. 14).

Trial Examiner's Supplemental Decision.

RECOMMENDED ORDER

For the reasons stated, it is recommended that the Board reaffirm its conclusions and order as set forth in the original proceeding, 165 NLRB 1325.

Dated at Washington, D.C.

SAMUEL M. SINGER
Trial Examiner

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APR 3

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1254

UNITED STATES STEEL CORPORATION, ET AL.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD AND
UNITED MINE WORKERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM OF UNITED MINE WORKERS OF AMERICA IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM OF UNITED MINE WORKERS OF AMERICA IN OPPOSITION

The petition for certiorari filed by the petitioning steel companies is so totally devoid of any ground that would warrant this Court's review of the dismissal of their petition to review a supplemental order of the National Labor Relations Board that respondent United Mine Workers of America (hereinafter "UMWA") is reluctant to burden this Court with a detailed statement of facts. We will not add to the facts as set forth by the National Labor Relations Board (hereinafter "Board" or "NLRB"). The question

presented in this case is whether persons who were not parties before the NLRB nor bound by the contract clause upon which the Board ruled will be permitted to seek review of the Board's decision and order in the United States Court of Appeals after the unsuccessful charging parties themselves declined to seek review.

In the Court of Appeals, the Board argued that the case was not appropriate for review because there is no justiciable case or controversy. The UMWA agrees wholeheartedly with that proposition, but would go further. We contend that, even if there were a justiciable case or controversy, the petitioners have no standing to seek review, and the Court of Appeals could have properly dismissed the petition for review on this ground as well.[1]

On October 2, 1972, when the United States Court of Appeals for the District of Columbia Circuit issued its decision dismissing all appeals in that consolidated proceeding "for lack of a justiciable case or controversy and want of jurisdiction", *International Union, United Mine Workers of America* v. *NLRB (Dixie Mining Co., Dan S. Davison, United States Steel Corp., et al.)*, 468 F.2d 1139, 1140 (Pet. App. 5a), the Court noted (Pet. App. 9a):

> "The most salient fact about the 80-cent clause is that no party has yet appealed from the Board's second supplemental decision dismissing the 8(e) complaint. Accordingly, there is no party aggrieved properly before this Court within the meaning of Section 10(f) of the Act which delineates our appellate jurisdiction over the Board . . . The charging parties were aggrieved, but they have not as yet decided to file an appeal and obviously we cannot compel them to do so." (footnote omitted)

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[1] After the Court granted the Board's motion and dismissed the petition to review (Pet. App. 2a-3a), our motion to dismiss the petition was "dismissed as moot" (Pet. App. 3a).

The present case is in an identical posture to the case before the Court of Appeals in 1972: No aggrieved party has challenged the Board's supplemental decision; there is no justiciable case or controversy before the Court; and to require the matter to rest upon a record devoid of the facts peculiar to the petitioners would be prejudicial to the UMWA and not in the best interests of justice nor of the orderly administration of the courts.

In the underlying case, the Board held that the instant petitioners were not parties to the proceedings before it (Pet. App. 13a, n. 3). The first time any of the petitioners entered this proceeding was subsequent to the Trial Examiner's Decision and the Court of Appeals' remand when they attempted to file exceptions thereto. The Board denied their request for leave to file those exceptions "as these companies [United States Steel Corp., Bethlehem Steel Corp., Jones & Laughlin Steel Corp., Republic Steel Corp., C.F. & I. Steel Corp., Inland Steel Corp., and Youngstown Sheet & Tube Corp.] are not parties to the proceedings before the Board." (*Id.*) The Board did treat their brief as an *amicus curiae* brief and considered it on that basis. (*Id.*)

Section 10(f) of the National Labor Relations Act (29 U.S.C. 160 (f)) provides that, "[a]ny person aggrieved by a final order of the Board . . . may obtain review of such order in any circuit court of appeals . . . ." In order to be a "person aggrieved," one "must have been a party to the proceedings before the Board" and have suffered "an adverse effect in fact" as a result of its ruling. *C. Norris, The Developing Labor Law*, 876 (1971).

Amici curiae have long been distinguished from "parties" and denied the right to petition for review of judgments in which they were merely bystanders volunteering information to the Court. Thus, this Court has stated that

"[b]ecause an *amicus* is not a 'party' to the case, it would not have been entitled to file a petition to review a judgment on the merits by the Court of Appeals." *International Union, Local 283* v. *Scofield,* 382 U.S. 205, 209 (1965).

Since the petitioners were not parties to the underlying Board proceeding, there is no record evidence to support any claim that they have suffered an "adverse effect in fact" sufficient to bring them within the scope of a "person aggrieved."[2]

Before the Board, petitioners never claimed any specific "adverse effect in fact" by virtue of the challenged clause, nor could they. At issue is the validity of the 80-cent provision in the 1964 amendments to the National Bituminous Coal Wage Agreement of 1950 which was not incorporated into the collective bargaining agreement executed by the petitioner "captive coal mine" companies who produce coal to keep their own coke ovens in production. The clause was carried over to the 1968 Agreement signed by the captive companies, but the petitioners were exempted from the operation of the clause by a side letter agreement which

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[2] Compare, *Retail Clerks, Local 1059* v. *National Labor Relations Board,* 348 F.2D 369 (C.A.D.C. 1965), where a non-party union was found to have sufficient interest to seek judicial review because it had been named in a settlement order of the NLRB requiring the employer to cease and desist from giving it "unlawful assistance." There, the union was clearly a party in interest, if not in fact, and the "adverse effect in fact"—the label as a "sweetheart union"—could be fairly inferred without an evidentiary record as to effect. As we show, this is not the case here, and petitioners can draw no support for their position from this ruling.

provided that the clause would not be binding upon them until such time as it was held valid by a court of last resort.[3]

Because the petitioners were not bound by the clause now before this Court nor parties before the Board, there is no record evidence of their being adversely affected in fact by its operation.

There is warrant for treating the captive coal companies differently than the other signatories and requiring specific economic evidence as to their operations. Thus, for example, there is no evidence in the record of a ready availability from non-signatories of the metallurgical coal which meets their requirements. There is reason to believe that such coal is available in sufficient quantities from sources already owned and operated by signatories, and the issue may well be one of insufficient magnitude to warrant this Court's attention. The utter lack of record evidence on this score serves to emphasize that the Court of Appeals is an inappropriate forum for this critical issue to be raised in the first instance. Whatever unspecified, potential harm petitioners now claim to suffer is insufficient to constitute a "justiciable case and controversy" within the jurisdiction of the federal courts.

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[3] In the latest National Bituminous Coal Wage Agreement signed in 1971, the 80-cent clause was replaced by a contract provision, to which petitioners are parties, which calls for the payment of different tonnage royalties into the UMWA Health and Welfare Fund. These developments were not made part of the record before the Board which relied on the prior agreements and based its findings on 1967 coal industry figures. See and compare, *International Union, United Mine Workers of America* v. *National Labor Relations Board, etc. (Dixie Mining Co. and Dan S. Davison)*, 486 F.2d 1139 (C.A.D.C. 1972) (No. 23,947) (Pet. App. 5a-7a), where the Court of Appeals dismissed as moot a case based on the protective wage clause which appeared in pre-1964 agreements, on the ground that the clause in question had been replaced by the 80-cent clause.

Moreover, if metallurgical coal were available in sufficient quantities from non-signatory sources, since the petitioners were not parties before the Board, there has been no opportunity to develop before the appropriate fact-finding tribunal evidence relating to the specific economic situation of the captive coal mines. Such evidence would demonstrate whether the captives have a greater specific temptation to subcontract their operations such as would warrant application of the 80-cent clause to them, regardless of the appropriateness to the signatories who were parties below.

Since the salient facts relative to the petitioners herein were not developed below because the petitioners were not parties to that proceeding, it would be extremely prejudicial to the UMWA to be forced to support the Board's decision on a record utterly devoid of facts relevant to the non-parties who petitioned for review of that order.

The petition for writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES STEEL CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1254

UNITED STATES STEEL CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioners—steel companies which own coal mines which produce coke for use in their steel production ("captive mines")—seek review of an order of the court of appeals (Pet. App. 2a-3a) dismissing their petition to review a supplemental order of the National Labor Relations Board (Pet. App. 12a-22a). The relevant facts are as follows:

a. In 1967, the Board found that the United Mine Workers of America (the "Union") and the Bituminous Coal Operators Association ("BCOA"), a multi-employer bargaining association, violated Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C.

158(e),[1] by entering into and maintaining the so-called "80-cent" provision of the 1964 amendments to the National Bituminous Coal Wage Agreement of 1950 ("Wage Agreement") (Pet. App. 12a). That provision required signatory coal operators to pay into the United Mine Workers Welfare and Retirement Fund a royalty of 40 cents on each ton of coal they produced and a royalty of 80 cents on each ton of coal they bought from a nonsignatory operator (Pet. 5). In 1968, the court of appeals denied enforcement of the Board's order and remanded the case to the Board to consider whether the 80-cent clause had the lawful object and effect of protecting the work and standards of employees in the primary bargaining unit (Pet. App. 31a-32a). *Int'l Union, United Mine Workers of America* v. *National Labor Relations Board, etc. (Dixie Mining Company and Dan S. Davison),* 399 F. 2d 977 (C.A.D.C.).[2]

b. Petitioners were not parties to the original proceeding before the Board or the court of appeals. Nor did they seek to intervene in the Board proceeding on remand,

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[1]Section 8(e), 29 U.S.C. 158(e), provides, in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from * * * doing business with any other person * * *.

[2]The proceeding came before the court on the Union's petition to review the Board's order and the Board's cross-application for enforcement. Dixie Mining Company and Dan S. Davison, two of the charging parties before the Board, intervened in the court of appeals. Dixie, a nonsignatory operator, opposed the 80-cent clause as a restriction on its sale of coal to signatories. Davison, on behalf of Riverton Coal Company, a signatory operator, opposed the clause as a restriction on Riverton's purchases of coal from nonsignatories.

although they did participate as *amici* (Pet. App. 13a, n. 3). Moreover, although petitioners are members of BCOA, and thus signatories of the Wage Agreement, they were exempted from the 80-cent clause pursuant to an agreement of the parties that the clause should apply only to commercial and not to captive mines. In 1968, petitioners signed a side agreement with the Union, which provided that: "If during the life of the [A]greement all questions concerning the lawfulness of the 80-cent clause shall have been resolved in favor of such clause by the court of last resort, the below named employer to whom such clause shall not have been applicable, shall engage in good faith negotiations * * * concerning what action may then be appropriate between it and the UMWA [the Union] under the then existing circumstances" (Pet. 7; Pet. App. 18a, n. 9).

c. On February 26, 1971, the Board issued its supplemental decision and order, finding that the 80-cent clause did not contravene Section 8(e) and dismissing the complaint against the Union and BCOA (Pet. App. 12a-22a). The Board determined, on the evidence adduced at the remand hearing, (1) that the intent of the parties in adopting the 80-cent clause was to protect the work opportunities and standards of employees under the agreement by equalizing the labor costs of signatory and nonsignatory operators; (2) that nonsignatory operators generally provided lower wages, fringe benefits, and working conditions than those established in the agreement; and (3) that the 80-cent royalty charged on purchases from nonsignatories bore a reasonable relationship to the difference between their labor costs and those of signatories (Pet. App. 14a, 38a-44a, 65a-71a). The Board noted that the 80-cent clause did not apply to the purchase of nonsignatory coal by steel companies like petitioners that own and operate captive mines (Pet. App. 18a, n. 9).

d. Shortly after the Board issued its supplemental decision and order, the court of appeals, *sua sponte*, directed that the case be consolidated with a pending proceeding involving the Protective Wage Clause ("PWC") of the National Bituminous Coal Wage Agreement, which was superseded in 1964 by the 80-cent clause.[3] Dixie Mining Company, a charging party before the Board in the 80-cent clause case and an intervenor in the original review proceeding (*supra*, p. 2, n. 2), opposed the court's reassertion of jurisdiciton over the 80-cent clause case on the ground that no petition to review the Board's supplemental order had been filed under Section 10(f) of the Act.[4] When the court denied its motion to vacate the consolidation, Dixie argued that the Board's supplemental order should be set aside. Petitioners, who had intervened in the court of appeals, also urged the court to set aside the Board's dismissal of the complaint in the 80-cent clause case. However, they did not file a petition to review.[5]

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[3]The Board's supplemental order dismissing the complaint in the PWC case (179 NLRB 479) was before the court on the petition to review of Dixie Mining Company, an intervenor in that proceeding before the Board. *Dixie Mining Company* v. *National Labor Relations Board, etc.* (C.A. D.C., No. 23,947).

[4]Section 10(f), 29 U.S.C. 160(f), provides, in relevant part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any [appropriate] circuit court of appeals of the United States * * * by filing in such court a written petition praying that the order of the Board be modified or set aside * **.

[5]Petitioners, like Dixie, had earlier moved to vacate the court's *sua sponte* consolidation of the 80-cent clause case with the pending PWC case.

e. On October 2, 1972, the court of appeals dismissed "all appeals for lack of a justiciable case or controversy and want of jurisdiction" (Pet. App. 5a). Respecting the 80-cent clause case, the court held that it lacked jurisdiction because no petition to review the Board's supplemental order had been filed under Section 10(f). The court stated (Pet. App. 9a-10a):

> Clearly the union is not aggrieved by the Board's order inasmuch as the Board's dismissal of the complaint was the action the union itself requested. The charging parties were aggrieved, but they have not as yet decided to file an appeal and obviously we cannot compel them to do so.[6]

f. On June 20, 1973, petitioners for the first time filed a petition to review the Board's supplemental decision and order dismissing the complaint in the the 80-cent clause case. The Board moved to dismiss the petition on the ground that no justiciable case or controversy was presented.[7] On November 19, 1973, the court granted the Board's motion and dismissed the petition to review (Pet. App. 2a-3a).[8]

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[6]The court held that the PWC case was moot since the clause was suspended one week before the effective date of Section 8(e), and was removed from the agreement (and replaced by the 80-cent clause) shortly after the initial Board decision finding the PWC illegal (Pet. App. 5a-7a).

[7]Effective November 12, 1971, the National Bituminous Coal Wage Agreement was amended. The new contract raised the tonnage royalties that signatories are required to pay into the United Mine Workers Welfare and Retirement Fund, both on their own coal production and on their purchases of nonsignatory coal (Pet. 8-10). As signatories to the 1971 contract, petitioners agreed that their captive mines would be fully subject to the new royalty clause (Pet. 7).

[8]The Union's motion to dismiss the petition to review on the ground that petitioners were not persons aggrieved by the Board's order was "dismissed as moot" (Pet. App. 3a).

2. The court of appeals properly dismissed the belated petition for review filed by petitioners. Since petitioners, as captive mine operators, were never subject to the 80-cent clause (*supra*, p. 3), the legality of that clause as applied to them was never litigated before, nor determined by, the Board. Moreover, the Board's decision upholding the 80-cent clause rests on findings concerning the negotiations and intent of the parties when the clause was adopted in 1964, and on contemporaneous economic data revealing a reasonable relation between the 80-cent royalty and the differential in labor costs of signatories and nonsignatories (*supra*, p. 3). Thus, the present significance of the Board's decision for petitioners is limited to its force as a precedent on the question of the legality of the current 1971 clause—a clause providing for different royalty charges, imposed on a new category of coal operators, in what may be an altered economic context (see Pet. 9-10). The courts have traditionally declined to decide such an academic question. See *United States* v. *Fruehauf*, 365 U.S. 146, 157; *Flast* v. *Cohen*, 392 U.S. 83, 94-97; *O'Shea* v. *Littleton*, No. 72-953, decided January 15, 1974.

Even if, as petitioners assert (Pet. 14), there is a conflict between the Board's holding that the 80-cent clause did not violate Section 8(e) and the contrary view expressed by the Sixth Circuit in awarding damages against the Union under Section 303 of the Labor Management Relations Act, as amended (29 U.S.C. 187),[9] this, by itself, would not entitle petitioners to a judicial determination of the validity of that superseded clause. Nor are petitioners aided by the speculation (Pet. 16) that "it is conceivable—and perhaps probable—that the

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[9] *Riverton Coal Company (Dan S. Davison)* v. *United Mine Workers*, 453 F. 2d 1035 (C.A. 6), certiorari denied, 407 U.S. 915.

NLRB's General Counsel * * * will refuse to issue a complaint" if charges are filed based on present or future forms of the royalty clause. Issuance of such a complaint would properly depend on what the evidence showed with respect to the application and effect of the new clause in the economic situation which then existed.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1974.